APR. 23 1984

No. 83-6636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL ANTHONY GUZMAN,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

PARHAM & FINE, P.A.
JOSEPH M. FINE
812 Marquette, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-4541

QUESTIONS PRESENTED

1.

In determining whether an individual is to receive the death penalty, is it a violation of his right to due process to require a jury to weigh the aggravating and mitigating circumstances and to consider the defendant and the crime without any standards or guidelines for considering the defendant and the crime?

2.

Did the State of New Mexico violate the Petitioner's rights to counsel and due process by ignoring its own published guidelines regarding proportionality review in considering cases clearly outside of such guidelines, and by considering cases which were decided after the submission of the appellate briefs?

3.

If one aggravating circumstance with alternative provisions is expanded, contrary to state law, into two separate aggravating circumstances, is the death penalty to be set aside in a jurisdiction which requires a balancing of aggravating and mitigating factors?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED.	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS.	2
STATEMENT OF THE CASE.	3
(1) FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.	3
(2) MANNER IN WHICH QUESTIONS PRESENTED FOR REVIEW WERE RAISED.	6
REASONS FOR GRANTING THE WRIT.	9
POINT I: IN DETERMINING WHETHER AN INDIVIDUAL IS TO RECEIVE THE DEATH PENALTY, IT IS A VIOLATION OF DUE PROCESS TO REQUIRE A JURY TO WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND TO CONSIDER THE DEFENDANT AND THE CRIME WITHOUT ANY STANDARDS OR GUIDELINES FOR CONSIDERING THE DEFENDANT AND THE CRIME	9
POINT II: THE STATE OF NEW MEXICO VIOLATED MICHAEL GUZMAN'S RIGHTS TO COUNSEL AND DUE PROCESS BY VIOLATING ITS OWN PUBLISHED GUIDELINES REGARDING PROPORTIONALITY REVIEW IN CONSIDERING CASES CLEARLY OUTSIDE OF SUCH GUIDELINES AND BY CONSIDERING CASES WHICH WERE DECIDED AFTER THE SUBMISSION OF THE APPELLATE BRIEFS	17
POINT III: IN A JURISDICTION WHICH REQUIRES A BALANCING OF AGGRAVATING AND MITIGATING FACTORS, IT IS A VIOLATION OF DUE PROCESS IF ONE AGGRAVATING FACTOR WITH ALTERNATIVE PROVISIONS IS EXPANDED, CONTRARY TO STATE LAW, INTO TWO SEPARATE AGGRAVATING FACTORS.	21
CONCLUSION	25
INDEX TO APPENDIX (Precedes Appendix)	v

TABLE OF AUTHORITIES

Cases Cited:	Page(s)
Barclay v. Florida, ____U.S.____, 103 S.Ct. 3418 (1983).	9,14,16
Beck v. Alabama 477 U.S. 625 (1980).	10
California v. Ramos, ____U.S.____, 103 S.Ct. 3446 (1983).	9
Cole v. Arkansas, 333 U.S. 196 (1947).	18
Furman v. Georgia, 408 U.S.238 (1974).	10,11
Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980).	10
Gregg v. Georgia, 428 U.S. 153 (1976).	10
Lockett v. Ohio, 438 U.S. 586 (1978)	14,15
State v. Cheadle, 22 N.M. State Bar Bull. 1319 (1983).	19
State v. Garcia, 99 N.M. 771, 783 664 P.2d 969 cert. denied, ____ U.S. _____, 103 S.Ct. 2464 (1983).	12,18,19
State v. Gilbert, 22 N.M. State Bar Bull. 1174 (1983).	19
State v. Guzman, 23 N.M. State Bar Bull. 126, 128 (1984).	8
State v. Hutchinson, ((N.M. 616, 661 P.2d 1315 (1983)	19,20
State v. Simonson, 22 N.M. State Bar Bull. 1125 (1983).	19,20
Woodson v. North Carolina, 428 U.S. 280 (1976)	16
Zant v. Stephens, ____U.S.____, 103 S.Ct. 2733 (1983).	14,16,22,24,25
Constitution Amendments Cited:	
Sixth Amendment.	2,20
Fourteenth Amendment	2,10,20

Page(s)

Statutes Cited:

N.M. Stat. Ann. §28-6-1 (1978). 5

N.M. Stat. Ann. §31-2-1 (1978). 11

N.M. Stat. Ann. §31-20A-1 (Repl. Pamp. 1981). . . 3,11

N.M. Stat. Ann. §31-20A-2 (Repl. Pamp. 1981). . . 2,11

N.M. Stat. Ann. §31-20A-4 (Repl. Pamp. 1981). . . 3,17

N.M. Stat. Ann. §31-20A-5 (Repl. Pamp. 1981). . . 2,11,15,21,22

N.M. Stat. Ann. §31-20A-6 (Repl. Pamp. 1981). . . 2,4,5,11,15

N.M. UJI Crim. 39.13. 2,22,23

N.M. UJI Crim. 39.30. 24

N.M. UJI Crim. 39.31. 2,13,14

N.M. UJI Crim. 39.33. 2,6,8,10,11,12

N.M. UJI Crim. 39.39. 2,24

N.M. UJI Criminal General Use Note. 22

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OPINIONS BELOW

The opinion of the New Mexico Supreme Court is reported as State v. Guzman, 23 NM State Bar Bull. 126 (January 13, 1984). This opinion has yet to be reported in the official or unoffical reports. ____ NM _____, _____P.2d ___(1984). See Appendix at pp. 1-7.

The order denying the motion for a rehearing has yet to be reported. ____NM_____, ___P.2d____(1984). See Appendix at p. 8 for a copy of such Order.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on January 13, 1984. See State v. Guzman, 23 N.M. State Bar Bull. 126 (January 13, 1984). A timely motion for rehearing was filed, and denied on February 23, 1984. See Appendix at p. 8.

This petition for certiorari has been filed within the allowable sixty days from such date. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are:

(1) The Sixth Amendment to the United States Constitution which states, in part, that an accused has the right ". . . to have the Assistance of Counsel for his defense."

(2) Section 1 of the Fourteenth Amendment to the United States Constitution, which provides, in part, that a state shall not ". . .deprive any person of life, liberty, or property, without due process of law. . ."

(3) The following state statutes which are fully set forth in the Appendix:

a. N.M. UJI Crim. 39.33 (Appendix at p. 9.)

b. N.M. Stat. Ann. §31-20A-2 (Repl. Pamp. 1981). (Appendix at p. 10.)

c. N.M. Stat. Ann. §31-20A-6 (Repl. Pamp. 1981). (Appendix at p. 11.)

d. N.M. Stat. Ann. §31-20A-5 (Repl. Pamp. 1981). (Appendix at p. 12.)

e. N.M. UJI Crim. 39.39. (Appendix at p. 13.)

f. N.M. UJI Crim. 39.13. (Appendix at p. 14.)

g. N.M. Stat. Ann. §31-20A-4 (Repl. Pamp. 1981). (Appendix at p. 15.)

h. N.M. UJI Crim. 39.31. (Appendix at p. 16.)

STATEMENT OF THE CASE

(1) Facts material to the consideration of the questions presented.

Petitioner, Michael Anthony Guzman, was tried during April, 1982 in the District Court of Bernalillo County, New Mexico and convicted of first degree murder, one count of criminal sexual penetration, two counts of kidnapping and one county of tampering with evidence.

The jury found three separate statutory aggravating circumstances, murder in the course of a kidnapping, murder in the course of a criminal sexual penetration and murder of a prospective witness for the purpose of preventing the report of or testimony regarding the crime.

Substantial mitigating factors were presented to the jury. In fact, after the jury returned a verdict for the death sentence, the trial judge commented:

> Had I, as trial Judge, been weighing the aggravating circumstances against the mitigating circumstances, I would have reached a different conclusion than the jury reached; and I would have imposed a life sentence. [R. at 508.]

Although the trial judge disagreed with the jury's decision, in New Mexico, it is the jury and not the trial judge who determines whether an individual will receive the death penalty. N.M. Stat. Ann. §31-20A-1B (Repl. Pamp. 1981).

The defense called twelve witnesses to testify at the sentencing proceeding. It is uncontroverted that five of the nine statutory mitigating factors were present. See Appendix at p. 11 for the statutory mitigating factors contained in N.M. Stat. Ann. §31-20A-6 (Repl. Pamp. 1981), and see Appendix at p. 17 for actual instruction regarding the mitigating factors.

The uncontroverted mitigating factors were:

1. "[T]he defendant has no significant history of prior criminal activity." N.M. Stat. Ann. §31-20A-6A (Repl. Pamp. 1981). At the time of the trial, Michael had not been convicted of any crime as either an adult or a juvenile.

2. "[T]he defendant's capacity to conform his conduct to the requirements of the law was impaired." N.M. Stat. Ann. §31-20A-6C (Repl. Pamp. 1981), in part. At the time of the incident Michael was under a physician's medication for anxiety and depression. Both prosecution and defense witnesses who addressed the issue stated that Michael suffered from either schizophrenia, psychosis or a borderline personality condition which impaired his ability to conform his conduct to the requirements of the law.

3. "[T]he defendant was under the influence of a mental or emotional disturbance." N.M. Stat. Ann. §31-20A-6 (Repl. Pamp. 1981). All expert witnesses stated that Michael was under the influence of a mental or emotional disturbance. Dr. Ned Siegel, an expert for the State, agreed that Michael was ". . . a disturbed person, a person with lots of emotional problems, certainly no argument about that." Tape 21A at 56.

The Petitioner's emotional disturbance was evident after the incident when he was determined to be incompetent and sent to the State Forensic Hospital for a period of approximately six months. R. at 236 and 295.

4. "[T]he defendant cooperated with authorities."

N.M. Stat. Ann. §31-20A-6H (Repl. Pamp. 1981). Approximately eighteen days after the incident, when the police did not have a suspect, the Petitioner voluntarily surrendered himself to the police. He submitted to three different detailed taped statements in which he helped the police to obtain evidence and confessed to murder, kidnapping and the killing of a potential witness.

5. "[T]he defendants age." N.M. Stat. Ann. §31-20A-6I (Repl. Pamp. 1981). Michael was eighteen years and two months old at the time of the incident. In New Mexico, one is a juvenile if he is under eighteen years old. N.M. Stat. Ann. §28-6-1 (1978).

With respect to the other statutory mitigating factors, substantial evidence was presented regarding N.M. Stat. Ann. §31-20A-6F (Repl. Pamp. 1981), which states, in part, "the defendant acted under circumstances which tended to reduce the crime," and N.M. Stat. Ann. §31-20A-6G (Repl. Pamp. 1981), which states: "the defendant is likely to be rehabilitated."

With respect to the mitigating factor, "the defendant acted under circumstances which tended to reduce the crime," a physician testified that he prescribed Limbatrol and Codeine to the Petitioner just one week before the incident. Both the psychiatrist at the State Forensic Hospital and a psychopharmacologist testified that such prescription was inappropriate for a person like the Petitioner since it could precipitate or exacerbate a psychotic reaction, making it more difficult for such a person to control himself.

Due to the Petitioner's young age, cooperation with authorities, remoreseful attitude, good behavior during his tenure in the State Psychological Hospital, positive responses to psychotherapy and motivation towards treatment, it was the opinion of many witnesses that the Petitioner could be rehabilitated.

In fact, the witnesses who discounted this factor did believe in a more limited rehabilitation, that is, that Michael could rehabilitate himself so as not to pose a danger to himself or to others in a correctional setting.

Substantial evidence was also presented that the non-statutory mitigating factor of remorse was present, and numerous witnesses testified regarding the Petitioner's remorse. Six statutory mitigating factors, four of which were uncontroverted, were therefore submitted to the jury to be weighed against three aggravating factors, two of which the Petitioner contends should have been alternative to one aggravating factor. See pp. 21 to 25. See p. 18 of the Appendix for chart showing the mitigating versus the aggravating factors.

(2) Manner in which questions presented for review were raised.

(A) Question regarding constitutionality of requiring jury to consider the defendant and the crime without appropriate guidelines.

This issue was raised before closing argument when defense counsel objected to Instruction Number 12, (R. at 392), which is New Mexico UJI Crim. 39.33. Tape 1B, at 633-650; and Tape 2A, at 0-13. See Appendix at p. 9. The specific language to which the objection related is underlined:

> After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be

> sentenced to death or
> life imprisonment.
> [Emphasis added.]

Defense counsel argued that such phrase invited the jury to create "non-statutory aggravating factors"; that the aggravating factors are limited by statute; and that such phrase voided the guidelines directing the jury and was unconstitutional. Tape 1B, at 633-650: and Tape 2A, at 0-31.

The court accepted an oral tender of an instruction deleting the language "and considering both the defendant and the crime." Tape 2A, at 025. When asked to respond to the argument, the Assistant District Attorney responded, in part, that the New Mexico UJI was mandatory and cannot be altered. The trial judge ruled:

> I'll give the UJI.
> I'm not very confident
> it's appropriate.
> [Tape 2A, at 53.]

In response to an argument by defense counsel that the Assistant District Attorney should be limited to discussing "the defendant and the crime" in terms of aggravating and mitigating factors, the court advised but did not limit the Assistant District Attorney:

> . . . I think if it
> [aggravating and mit-
> igating factors] is
> not tied in I have
> strictly eliminated
> the legislative criteria
> for the death penalty
> and that's unconstitu-
> tional. [Tape 2A, at
> 145.]

Point I of the Brief-In-Chief included the argument embodied in the first question, that is, that N.M. UJI

Crim. 39.33 permitted the death penalty to be imposed in an arbitrary manner. See Brief-In-Chief at pp. 1-16.

The New Mexico Supreme Court rejected the argument that non-statutory aggravating circumstances are unchanneled and arbitrary by stating the N.M. UJI Crim. 39.33 does not allow the consideration of non-statutory aggravating circumstances, and relates to the weighing process and not to the threshold determination of whether the aggravating circumstance exists. State v. Guzman, 23 N.M. State Bar Bull. 126, 128 (Feb. 9, 1984). The motion for rehearing again raised the issue which was denied by the New Mexico Supreme Court. See Appendix at p. 8.

(B) Question regarding violation of due process as a result of the New Mexico Supreme Court both violating its own guidelines, and considering cases which were decided after the submission of the Petitioner's Brief-In-Chief and Reply Brief.

A motion to compel the Attorney General to release information regarding capitol cases or, alternatively, a request for the New Mexico Supreme Court to provide a method for disseminating such information so that Petitioner's counsel could adequately prepare for the proportionality review was made at the appellate stage to the New Mexico Supreme Court. See Appendix at pp. 19-21. This motion was denied by the New Mexico Supreme Court on December 29, 1982. Appendix at p. 22.

It was pointed out in the Brief-In-Chief directed to the New Mexico Supreme Court that under Supreme Court guidelines, there were no cases which could be compared to the case-at-hand.

Brief-In-Chief at p. 31.

(C) Question regarding whether expanding one aggravating circumstance with two alternatives into two aggravating circumstances violated the Petitioner's right to due process.

The above issue was raised in the trial court when defense counsel objected to Instruction Number 3 which listed murder during the commission of the kidnapping and murder during the commission of a criminal sexual penetration as two separate aggravating factors. Record at 382 and Tape 2B at 594-630. This instruction had been objected to earlier when the sentencing instructions were discussed. Tape 1B, at 206 and 241-306. The trial court overruled the objection.

The Brief-In-Chief which was submitted to the New Mexico Supreme Court briefed this issue on pp. 17-22. The motion for rehearing against raised this issue, which was denied by the New Mexico Supreme Court. See Appendix at p. 8.

REASONS FOR GRANTING THE WRIT

POINT I: IN DETERMINING WHETHER AN INDIVIDUAL IS TO RECEIVE THE DEATH PENALTY, IT IS A VIOLATION OF DUE PROCESS TO REQUIRE A JURY TO WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND TO CONSIDER THE DEFENDANT AND THE CRIME WITHOUT ANY STANDARDS OR GUIDELINES FOR CONSIDERING THE DEFENDANT AND THE CRIME.

This Court, while declining to impose rigid and mechanical substantive factors that a sentencing authority must consider when deliberating a death sentence, See California v. Ramos, ___ U.S. ___ 103 S.Ct. 3446 (1983); Barclay v. Florida, ___ U.S. ____, 103 S.Ct. 3418 (1983), has nevertheless

recognized that the 14th Amendment to the United State Constitution does require that a state meet minimum standards before it may impose the death penalty. These minimum standards have been defined to require that a death penalty statute

> ". . . channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1764-1765 (1980). See also Furman v. Georgia, 408 U.S. 238 (1974); and Gregg v. Georgia, 428 U.S. 153 (1976). These minimum standards are based on this Court's recognition that the death penalty is qualitatively different than any other punishment in its severity and finality. See Beck v. Alabama, 477 U.S. 625 (1980). A death penalty statute that does not meet these minimal standards will be struck down by this Court. See Godfrey v. Georgia, 446 U.S. 420 (1980).

New Mexico UJI Crim. 39.33, a copy of which is included in the Appendix at p. 9, describes the procedure for a jury's considering the penalty which is to be imposed in a capitol case.

> After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment. [Emphasis added.]

See Appendix at p. 23 for the specific instruction which was

given to the jury in the case-at-hand.

Under the above standard, the jury is required to weigh the mitigating against the aggravating circumstances and consider the defendant and the crime. The aggravating circumstances are limited by statute. N.M. Stat. Ann. §31-20A-5 (Repl. Pamp. 1981); See Appendix at p. 12. While the mitigating circumstances statute describes nine specific circumstances, additional mitigating circumstances are permitted. N.M. Stat. Ann. §31-20A-6 (Repl. Pamp. 1981); See Appendix at p. 11.

For an indiviudal to receive the death penalty in New Mexico, he must therefore pass through three stages:

1. Be found guilty of a crime for which the death penalty is permitted. N.M. Stat. Ann. §30-2-1 (1978) and N.M. Stat. Ann. §31-20A-1, (Repl. Pamp. 1981).

2. Be found to have committed murder accompanied by a statutory aggravating circumstance(s). N.M. Stat. Ann. §31-20A-2 (Repl. Pamp. 1981).

3. The jury must then weigh the mitigating against the aggravating circumstances and consider the defendant and the crime. N.M. UJI Crim. 39.33.

The first two steps are not contested. However, the third step, which includes considering the defendant and the crime, is in violation of Furman and it progeny. As stated by New Mexico Supreme Court Justice Sosa,

> . . . N.M.UJI Crim. 39.33 . . . gives the jury no guidance as to the meaning of 'considering both the defendant and the crime.' The only aggravating circumstances which a jury may consider are those specifically listed in the statute. §31-20A-5. Thus, the defendant and the crime may not be considered

> as an aggravating circumstance but only in mitigation. The jury obviously should be instructed to this effect. Failure to so instruct the jury would allow them to consider the defendant and the crime in aggravation and would allow a juror to use his unfettered bias or prejudice against the defendant of a different ethnic or racial group.

State v. Garcia, 99 N.M. 771, 783, 664 P.2d 969, cert. denied, ____ U.S. ____, 103 S.Ct. 2464 (1983), (concurring opinion on all issues except the issue of the death penalty).

In considering the defendant, the jury is free to consider his race, religion, political views and other areas of constitutionally protected behavior. See Appendix at p. 24 for material which the jury could have considered based upon the evidence at trial. In addition, the jury could consider numerous factors which bear no relation to whether an individual should be sentenced to death. Because "considering the defendant" is such an open-ended directive and does not require any written findings, another problem is posed by the fact that it is impossible to rationally review a jury's findings with respect to this phrase.

Under N.M. UJI Crim. 39.33, the jury can determine that the mitigating outweigh the statutory aggravating circumstances, but, after considering the defendant and the crime, sentence an individual to death on the basis of what may be constitutionally protected conduct and irrational but unknown non-statutory aggravating factors which enter into the balancing process.

Although the aggravating circumstances statute limits such circumstances to those in the statute, the actual instruction given to the jury, which was derived from N.M. UJI Crim. 39.33, did not. See Appendix at p. 9 and 23. Since the jury has already considered the statutory aggravating factors in completing step 2, they are led to consider non-statutory aggravating factors by a consideration of the defendant and the crime, and since the mitigating circumstances instruction permits the jury to find additional non-statutory mitigating factors in the absence of the directive to consider the defendant and the crime, such directive is more likely to channel the jury into finding non-statutory aggravating circumstances.

There is no reason for consititutional protections to be abandoned at the most critical stage of the determination of whether an individual will live or die. Just because an individual is eligible for the third and final stages does not mean that, at this stage, the jury is free to exercise unfettered discretion.

In the opinion herein, the New Mexico Supreme Court suggested that N.M. UJI Crim. 39.31, which instructs the jury that the mitigating must not outweigh the aggravating circumstances beyond a reasonable doubt, in effect, cures any problems with respect to N.M. UJI Crim. 39.33 since the defendant and the crime do not enter into the balancing process. See State v. Guzman, 23 N.M. State Bar Bull. 126, 128 (1983); See Appendix at p. 2.

However, this reasoning fails to consider that:

(1) A jury could consider the defendant for additional non-statutory aggravating factors which would then

enter into the balancing process;

(2) N.M. UJI Crim. 39.33, which contains the jury procedure for considering the death penalty, does not include a statement that the mitigating must not outweigh the aggravating factors before the defendant and the crime are considered;

(3) Even if the jury applied N.M. UJI Crim. 39.33 and N.M. UJI Crim. 39.31 without considering the defendant and the crime for non-statutory aggravating circumstances, the considering of constitutionally protected activity as a non-statutory aggravating circumstance is suggested to be unconstitutional in Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733 (1983); and Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983).; and

(4) In N.M. UJI Crim. 39.33, the weighing of the aggravating and mitigating circumstances and the consideration of the defendant and the crime is a one-step, combined decision.

It is likely that the directive, to "consider the defendant and the crime" was actually inserted into New Mexico UJI Crim. 39.33 for the additional protection of a defendant's rights. In Lockett v. Ohio, 438 U.S. 586, 604 (1978), the Court held that a state court could not prohibit a jury from considering the defendant's character or the circumstance of the offense as mitigating factors.

The Committee Commentary to New Mexico UJI Crim. 39.33 is consistent with the Lockett holding.

> It also requires the trier of fact to consider the defendant and the crime. A consideration of the defendant would include his character and background. These considerations

would be in addition
to the specific mitigating
circumstances identified
in N.M. Stat. Ann
§31-20A-6 (Repl. Pamp. 1981).
[Emphasis supplied.]

However, the language of New Mexico UJI Crim. 39.33 permits the jury to use the phrase "consider the defendant and the crime" in order to find negative qualities of the defendant, that is, non-statutory aggravating factors which would determine whether such individual lives or dies.

It is not contended that a jury should not consider the "defendant and the crime." In fact, the sentencing proceeding should be an individual consideration of the character of the individual and the circumstances of the crime. Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733, 2744 (1983). However, this consideration should be made in terms of directives and standards which channel a jury's consideration and discretion. See Appendix at p. 26 for alternatives which would have permitted the consideration of the defendant and the crime to be properly incorporated within a jury instruction and consistent with the limitation of aggravating circumstances in New Mexico pursuant to N.M. Stat. Ann. §31-20A-5 (Repl. Pamp. 1981).

Assuming that the jury considered improper negative aspects of the defendant as non-statutory aggravating circumstances, a reversal of the death penalty is not precluded by Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733 (1983). In Zant the court held that if there are two aggravating circumstances and one is subsequently determined to be invalid, the invalidation of one will not invalidate the death penalty. This holding is

not applicable to the case-at-hand since it does not extend to jurisdictions which balance mitigating and aggravating factors, Zant at 2750.

Nor is the holding in Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983), in point. In Barclay, this Court held that an invalid aggravating circumstance is harmless error even in a jurisdiction which weighs aggravating against mitigating circumstances if there is another valid aggravating circumstance and there are no mitigating circumstances. Barclay is clearly distinguished from the case-at-hand in that the Guzman jury was instructed on seven mitigating circumstances. See Appendix at p. 17.

Barclay and Zant are further distinguished from the case-at-hand in that, in both cases, the Court specifically found that the respective improper aggravating circumstances did not involve areas of constitutionally-protected conduct. In the case-at-hand, it is very conceivable that the open-ended consideration of the defendant resulted in non-statutory aggravating factors which involved constitutionally-protected behavior. Because of the broad directive and the lack of findings, it would be an impossible burden for the Petitioner to prove that the jury considered a non-statutory aggravating factor involving constitutionall protected conduct. As stated in Woodson v. North Carolina, 428 U.S. 280, 305 (1976):

> . . . the penalty of death is qualitatively different from a sentence of imprisonment, however long. . . Because of that qualtitave difference, there is a

> corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

POINT II: THE STATE OF NEW MEXICO VIOLATED MICHAEL GUZMAN'S RIGHTS TO COUNSEL AND DUE PROCESS BY VIOLATING ITS OWN PUBLISHED GUIDELINES REGARDING PROPORTIONALITY REVIEW IN CONSIDERING CASES CLEARLY OUTSIDE OF SUCH GUIDELINES, AND BY CONSIDERING CASES WHICH WERE DECIDED AFTER THE SUBMISSION OF THE APPELLATE BRIEFS.

The issue of proportionality in the case-at-hand is particularly relevant in light of the numerous uncontroverted mitigating factors and the trial judge's comment that:

> Compared to other death penalty cases tried in this judicial district, the only ones of which I am intimitely familiar, those being Gilbert, Cheadle, and Garriscon, I feel that the sentence of death in this case is disproportionate to the penalty imposed in those cases. I believe an expression of these opinions are appropriate; for I believe they can and should be considered by the Supreme Court in reviewing this case under N.M. Stat. Ann. §31-20A-4C(2) and (4). [R. at 508.]

The New Mexico Supreme Court is required to review all death sentences. N.M. Stat. Ann. §31-20A-4 (Repl. Pamp. 1981). Part of this appellate process includes a determination of whether a death sentence in a particular case ". . . is excessive or disproportionate to the penalty imposed in similar cases. . ." N.M. Stat. Ann. §31-20A-4C(4) (Repl. Pamp. 1981).

Because the State of New Mexico provides for such an appeal, the New Mexico Supreme Court proceeding must provide a defendant all the due process rights guaranteed by the Fourteenth Amendment of the Constitution. See Cole v. Arkansas, 333 U.S. 196, 201 (1947).

On December 14, 1982, Petitioner's counsel filed a motion with the New Mexico Supreme Court in order to compel the New Mexico Attorney General to release information regarding other capital cases or, alternatively, a request for the New Mexico Supreme Court to provide a method for disemminating such information so that the Petitioner's counsel could adequately prepare for the proportionality issue. See Appendix at pp. 19 to 21. After oral argument, the New Mexico Supreme Court denied such motion. See Appendix at p. 22.

Approximately one month before the filing of the Brief-In-Chief, the New Mexico Supreme Court issued guidelines regarding proportionality in State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983), cert. denied, ____ U.S. ____, 102 S.Ct. 2464 (1983). These guidelines limited the cases which could be considered in a proportionality analysis to:

> Only those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received either the death penalty or life imprisonment and whose conviction and sentence have been upheld previously by this Court, will be considered appropriate for comparison.

State v. Garcia, supra at 780. See Appendix at p. 27 for a copy of the proportionality guidelines from Garcia.

Under the Garcia guidelines, there were no cases which could be compared to the case-at-hand since all such cases were decided by the New Mexico Supreme Court after the dates of the filing of the Brief-In-Chief and Reply Brief.

The Reply Brief herein was filed with the Clerk of the New Mexico Supreme Court on May 18, 1983. The cases relied upon by the New Mexico Supreme Court in the proportionality analysis herein are State of New Mexico v. Gilbert, 22 N.M. State Bar Bull. 1174 (1983), filed October 17, 1983; State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983), filed on March 16, 1983 but improper for consideration based upon New Mexico Supreme Court guidelines; State v. Cheadle, 22 N.M. State Bar Bull. 1319 (1983), filed on November 21, 1983; and State v. Simonson, 22 N.M. State Bar Bull. 1125 (1983), filed on September 23, 1983. Petitioner's counsel received no notice that these cases would be used as comparison cases regarding proportionality.

It was pointed out in the Brief-In-Chief that, under the Garcia guidelines, there were no cases which could be compared to the case-at-hand. Brief-In-Chief at p. 31. Yet, it was stated that in the one case which had similar aggravating circumstances but had yet to be reviewed by the New Mexico Supreme Court, that is, State v. Gilbert, subsequently reviewed and decided in 22 N.M. State Bar Bull. 1173 (1983), the jury was instructed on only three mitigating factors as opposed to seven in the case-at-hand. Brief-In-Chief at p. 31.

Significantly, two of the four cases relied upon by the New Mexico Supreme Court in the proportionality analysis herein, are inappropriate. The consideration of State v. Hutchinson,

99 N.M. 616, 661 P.2d 1315 (1983), pet. for cert. filed, 52 U.S. L.W. (December 16, 1983); and State v. Simonson, 22 N.M. State Bar Bull. 1125 (1983) violated the New Mexico standards for appellate review of the proportionality issue since the cases included different aggravating circumstances than those in the case-at-hand. The opinion in Simonson, supra, clearly indicates that the only aggravating factor was death of a witness, and the jury finding regarding aggravating circumstances in Hutchinson, supra, indicates that the jury found the aggravating factors of death of a witness and kidnapping but did not find the additional aggravating factor or criminal sexual penetration, which was found by the jury herein in addition to kidnapping and death of a witness. Hutchinson, Record at p. 602.

In effect, the Petitioner has been denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution. His attorney was denied information regarding death penalty cases; was not able to argue the cases which were considered by the New Mexico Supreme Court in deciding the issue since these cases were decided after all briefs were submitted; and, most significantly, was not permitted to respond to two cases he could not possibly have discovered because a consideration of these cases was inappropraite under the New Mexico Supreme Court's own guidelines.

Since the defendants did not receive the death penalty in the two cases which the Petitioner's attorney was not permitted to consider under New Mexico Supreme Court guidelines for deciding the proportionality issue; since there were numerous mitigating factors in the case-at-hand; and since the trial judge indicated that proportionality was, at the very least,

a major issue, it would have been critical for the Petitioner's counsel to have had the opportunity to present arguments to the New Mexico Supreme Court with respect to whether Michael Guzman fit into the "death" or "life imprisonment" pool.

POINT III: IN A JURISDICTION WHICH REQUIRES A BALANCING OF AGGRAVATING AND MITIGATING FACTORS, IT IS A VIOLATION OF DUE PROCESS IF ONE AGGRAVATING FACTOR WITH ALTERNATIVE PROVISIONS IS EXPANDED, CONTRARY TO STATE LAW, INTO TWO SEPARATE AGGRAVATING FACTORS.

N.M. Stat. Ann. §31-20A-5 (Repl. Pamp. 1981), describes the aggravating circumstances to be considered by the sentencing jury. See Appendix at p. 12. Subsection 31-20A-5B, relates to murder in the commission of various felonies and lists one aggravating circumstance which includes the alternative felonies of kidnapping, criminal sexual penetration and criminal sexual contact of a minor.

> B. The murder was committed with intent to kill in the commission of or attempt to commit kidnapping, criminal sexual contact of a minor or criminal sexual penetration; [§31-20A-5B, N.M.S.A. (1978). Emphasis supplied.]

At trial, despite an appropriate objection, the judge listed kidnapping and criminal sexual penetration as two separate aggravating circumstances. See Record at p. 382 and Appendix at p. 25.

If it were the intention to permit each of these felonies to constitute a separate aggravating factor in a case in which all three were present, each would have been listed as a separately lettered aggravating circumstance. For

example, "murder of a witness" is listed as a separate aggravating circumstance in N.M. Stat. Ann. §31-20A-5G (Repl. Pamp. 1981).

Interestingly, although this issue was not raised by the parties, with respect to a similarly phrased aggravating factor from another jurisdiction, this Court pointed out that such factor could be viewed as a single aggravating factor which rested on two grounds. Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733, 2738 (1983).

New Mexico UJI Crim. 39.13, the aggravating circumstances instruction, a copy of which is attached at p. 14 of the Appendix, is prefaced by the statement,

> The state has charged that the murder of [the deceased] was committed under the following aggravating circumstance(s):

The aggravating circumstances are then listed and separated by the conjunction "[AND]." It is therefore apparent that each aggravating factor is set forth and separated from the next aggravating factor by the word "[AND]." Since the "murder during a felony aggravating circumstance" is separated from is apparent that such phrase was intended to be considered as a single aggravating circumstance with three alternatives.

Moreover, the New Mexico UJI Criminal General Use Note, which was amended effective July 1, 1978, clearly indicates that the trial court should have included criminal sexual penetration and kidnapping as alternatives to one aggravating circumstances factor and should have used the word "or" in separating kidnapping from criminal sexual penetration.

> Many of the instructions contain alternative provisions. When the instruc-

> tions are prepared for use, only the alternative or alternatives supported by the evidence in the case may be used. The word "or" should be used to connect alternatives, regardless of whether the word is bracketed in the printed version of the instruction. [Emphasis added.]

It is impossible to state whether the jury would have sentenced Mr. Guzman to death if kidnapping and criminal sexual penetration were properly combined into one aggravating factor. However, it is reasonable to assume that many jurors would give greater weight to the number of aggravating factors and consider three aggravating factors to be more significant than two in a balancing procedure which is likely to involve both quantity and quality.

The likelihood of the jury being more influenced by three aggravating circumstances instead of two is heightened by the format of the aggravating versus that of the mitigating circumstances. The individual aggravating circumstances are extremely conspicuous as a result of each circumstance being separated from the other circumstances by the word "AND":

> . . . the murder was committed during the commission of kidnapping
>
> AND
>
> the murder was committed during the commission of Criminal Shxual Penetration. . . [R. 382 and New Mexico UJI Crim. 39.13.]

Yet, for some reason, the mitigating factors have a less distinguished format in that the individual factors are

not separated from each other by the word "AND". For example, in contrast to the aggravating factors, three statutory mitigating factors were combined, consistent with New Mexico UJI Crim. 39.39, so as to, superficially, appear to resemble one mitigating factor.

> . . . the defendant is likely to be rehabilitated; cooperation by the defendant with authorities; and the defendant's age. [R. 386 and New Mexico UJI Crim. 39.30.]

See Appendix at p. 17 and p. 25 for a comparison of the actual mitigating and aggravating circumstances instructions which were given to the jury.

In the New Mexico Supreme Court's opinion herein, the court did not actually reject the argument that one aggravating factor with alternative provisions was expanded into two but did state that any of the alternatives could be used as an aggravating circumstance which could provide the basis for the death penalty, a contention which is not in dispute. State v. Guzman, 23 N.M. State Bar. Bull. 126, 129 (1984). See Appendix at pp. 1-7. The issue is not whether each alternative could provide a basis for the death penalty but whether each alternative can be presented as a separate aggravating circumstance so as to increase the number of aggravating factors which will enter into the weighing process.

The New Mexico Supreme Court relied upon Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733 (1983) for the harmless error doctrine that when two or more aggravating circumstances are present, the invalidation of one will not invalidate the sentencing proceeding unless the invalidation is due to constitutionally protected conduct.

However, the Zant holding does not extend to the case-at-hand since New Mexico, as opposed to Georgia, is a state which requires the jury to balance the aggravating against the mitigating factors. As stated in Zant:

> . . . we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is invalid under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigatint circumstances in exercising its discretion whether to impose the death penalty. [103 S.Ct. 2733, 2750.]

CONCLUSION

For the previously stated reasons, the Petition for Writ of Certiorari should be granted by this Court.

Respectfully submitted,

PARHAM & FINE, P.A.
JOSEPH M. FINE
Attorney for Petitioner
812 Marquette, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-4541

INDEX TO APPENDIX

	Page(s)
Opinion herein.	A-1-A-7
Order denying motion for rehearing herein	A-8
Trial-court's conclusions of law including opinion that sentence was disproportionate to other death penalty cases and that mitigating outweighed aggravating factors . . .	A-8.1-A-8.3
Judgment of trial-court	A-8.4-A-8.5
Order denying motion for new trial.	A-8.6
N.M. UJI Crim. 39.33.	A-9
N.M. Stat. Ann. §31-20A-1 (Repl. Pamp. 1981).	A-10
N.M. Stat. Ann. §31-20A-6 (Repl. Pamp. 1981).	A-11
N.M. Stat. Ann. §31-20A-5 (Repl. Pamp. 1981).	A-12
N.M. UJI Crim. 39.30.	A-13
N.M. UJI Crim. 39.13.	A-14
N.M. Stat. Ann. §31-20A-4 (Repl. Pamp. 1981).	A-15
N.M. UJI Crim. 39.31.	A-16
Instruction Number 7	A-17
Aggravating versus mitigating circumstances	A-18
Motion regarding proportionality material	A-19-A-21
Denial of motion.	A-22
Instruction Number 12	A-23
Material Jury may have considered based on evidence when considering the defendant.	A-24
Instruction Number 3	A-25
Three alternatives for modifying N.M. UJI Crim. 39.33.	A-26
New Mexico Supreme Court proportionality guidelines.	A-27

Except as outlined above no other cases shall be assigned to the Family Court Division. This administrative order serves to amend any provision of Administrative Order # 32 inconsistent herewith.

C. Assignment in the event of Disqualification or Recusal.

Whenever the Family Court Division Judge shall be disqualified or recuse from a case, that case shall be assigned to the next judge in the list of cards for either civil cases or criminal cases.

D. Pending cases in Division I

All civil, criminal and probate cases [illegible] Division I as of the effective date of this order [illegible] remain in Division I.

s/ Petra Jimenez Maes, District Judge
s/ Tony Scarborough, District Judge, Division II
s/ Lorenzo F. Garcia, District Judge, Division III
s/ Bruce Kaufman, District Judge, Division IV
s/ Art Encinias, District Judge, Division V

Bulletin

ADVANCE OPINIONS OF
THE SUPREME COURT &
THE COURT OF APPEALS

From The New Mexico Supreme Court

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

MICHAEL ANTHONY GUZMAN,
Defendant-Appellant.

No. 14450 (filed January 13, 1984)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
GERALD R. COLE, District Judge

PAUL BARDACKE, Attorney General
CAROL VIGIL, Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JOSEPH M. FINE
Albuquerque, New Mexico
for Appellant

OPINION

WILLIAM RIORDAN, Justice.

Michael Anthony Guzman (Guzman) was convicted of murder in the first degree for which he received a sentence of death. Guzman was also convicted of attempted first degree murder for which he received nine years imprisonment; criminal sexual penetration in the second degree for which he received nine years; two counts of kidnaping for which he received eighteen years for each count; and tampering with evidence for which he received eighteen months. Guzman appeals. We affirm.

The issues on appeal are:

I. Whether NMSA 1978, UJI Crim. 39.33 (Repl.Pamp.1982) improperly permits the jury to consider aggravating circumstances not specified by statute when the jury is told to "consider both the defendant and the crime" in weighing aggravating and mitigating circumstances.

II. Whether NMSA 1978, Subsection 31-20A-5(B) (Repl.Pamp.1981) was improperly expanded into two separate aggravating circumstances.

III. Whether evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances, thereby preventing imposition of the death penalty.

IV. Whether a psychopharmacologist, in stating his opinion, may testify concerning facts given to him by Guzman.

V. Whether Guzman's sentence of death is excessive and/or disproportionate under the circumstances.

VI. Whether Guzman's sentence of death was imposed by the jury under the influence of passion and prejudice.

VII. Whether expert witnesses should have been permitted to state their opinions that Guzman should not be given the death penalty because of his mental impairment.

VIII. Whether the trial judge had authority to modify the jury's determination of Guzman's death sentence; and if so, whether it erred in not doing so.

IX. Whether NMSA 1978, Subsection 31-20A-6(H) (Repl.Pamp.1981), which specifies that cooperation with authorities is a mitigating circumstance, is constitutional.

FACTS

According to the trial testimony of Colleen Bush (Bush), on April 5, 1981, at approximately 9:00 p.m., after spending the evening studying, Bush and Julie Jackson (Jackson) walked to a restaurant located across from the University of New Mexico for some coffee. At approximately 11:30 p.m., Bush and Jackson left the restaurant to return to Bush's apartment. While walking to the apartment a man, later determined to be Guzman, walked toward Bush and Jackson. After he passed them, Guzman turned and put his arms around their necks. Guzman first placed a knife to Jackson's neck. He then placed the knife against Bush's neck.

Guzman forced Bush and Jackson into his car and then drove around for awhile. During the time Guzman was driving, he kept saying that he was lonely and wanted someone to talk to. Guzman eventually stopped the car in an arroyo and said, "O.K., ladies, the fun's over." Guzman brandished the knife, told Jackson to take off her clothes, and said, "If you don't do it your friend is going to get hurt really bad." At that time, Guzman held the knife to Bush's chest. Guzman also told Bush that he had a gun and that he was going to shoot her. Jackson took off her clothes and threw them to the back seat.

Next, Guzman ordered Bush to the back of his car and forced her to get in the trunk. Bush got out of the trunk by punching through the canvas and crawling into the back seat. She then jumped out of the car and started running. Guzman chased and caught her. Guzman then stabbed Bush in the back, chest, and neck a number of times. Guzman stated, "All my problems are because of you Anglos." Bush asked him to leave her alone so that she could die in peace. Guzman left for a few minutes and then came back and started stabbing her again in the chest and neck. Bush played dead, and Guzman left in his car. Later, Bush crawled to the highway. Someone in a passing vehicle eventually stopped to aid her.

The doctor who treated Bush testified that she had multiple stab and slash wounds, many close to vital organs.

Later that morning, Jackson's nude body was found. The autopsy showed that Jackson died from a stab wound to her chest that penetrated her heart. There was also evidence of sexual intercourse.

Guzman later turned himself in to the authorities.

I. UJI Crim. 39.33

Guzman argues that UJI Crim. 39.33 is unconstitutional because it permits the jury to consider aggravating circumstances not permitted by SA 1978, Section 31-20A-5 (Repl.Pamp.1981), and because it permits the death penalty to be imposed in an arbitrary manner which is not rationally reviewable.

The pertinent part of UJI Crim. 39.33 states:

> If you have unanimously agreed on a finding that . . . [one or more of the aggravating circumstances charged were] present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.
>
> If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against . . . [one or more aggravating circumstances] you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them

against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment. (emphasis added) (footnotes omitted).

Guzman argues that this phrase, "considering both the defendant and the crime" (which is directly from NMSA 1978, Subsection 31-20A-2(B) (Repl.Pamp.1981)), allows the jury to consider "the defendant and the crime" as an aggravating circumstance that is not specified by our death penalty statute.

UJI Crim. 39.33, in which this phrase appears, is not the instruction that specifies for the jury what alleged aggravated circumstance is relied upon by the State. The jury is clearly told by the other instructions which aggravating circumstance or circumstances must be proved before the jury may even consider the death penalty.

The jury in the present case was given NMSA 1978, UJI Crim. 39.30, 39.31 and 39.33 (Repl.Pamp.1982). Under UJI Crim. 39.30, mitigating circumstances were set forth for the jury to consider on behalf of Guzman. Under UJI Crim. 39.31, the jury was required to make two determinations: first, whether the State proved beyond a reasonable doubt that the murder was committed under the aggravating circumstances as charged; and second, whether the mitigating circumstances outweighed the aggravating circumstances. State v. Garcia, 99 N.M. 771, 664 P.2d 969, cert. denied, ___ U.S. ____, 103 S.Ct. 2464, 77 L.Ed.2d 1341 (1983). Once these threshold determinations were made, the jury was instructed under UJI Crim. 39.33, that they must weigh the aggravating circumstances and mitigating circumstances and consider Guzman and the crime in determining whether to sentence him to death or life imprisonment.

Guzman asserts that the language of UJI Crim. 39.33, in effect, allows non-statutory aggravating circumstances to be considered, and that it is therefore unconstitutional. We hold that UJI Crim. 39.33 does not allow the consideration of non-statutory aggravating circumstances. UJI Crim. 39.33 relates to the weighing process, not to the threshold determination of whether an aggravating circumstance exists.

We have previously held that UJI Crim. 39.33 does not allow the death penalty to be imposed in an arbitrary manner which is not rationally reviewable. State v. Cheadle, 22 SBB 1319 (1983); State v. Garcia. There is no indication that the jury is to consider non-statutory aggravating circumstances. Therefore, we again find no fault with UJI Crim. 39.33.

II. Subsection 31-20A-5(B)

Guzman asserts that Subsection 31-20A-5(B) was expanded into two separate aggravating circumstances which under NMSA 1978, UJI Crim. 39.13 (Repl.Pamp.1982), should only be one. Subsection 31-20A-5(B) provides as an aggravating circumstance:

[That] the murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration.

At the sentencing phase the jury was given three separate aggravating circumstances for consideration: Subsection 31-20A-5(B) for the murder of Jackson committed during the commission of kidnaping; Subsection 31-20A-5(B) for the murder of Jackson committed during the commission of criminal sexual penetration; and NMSA 1978, Subsection 31-20A-5(G) (Repl.Pamp.1981) for the murder of Jackson as a witness to a crime or person likely to become a witness to a crime.

The jury unanimously found beyond a reasonable doubt each of these aggravating circumstances, and for each of these aggravating circumstances unanimously agreed that Guzman should be sentenced to death.

Guzman does not allege that the aggravating circumstance charged under Subsection 31-20A-5(G) was improper. Guzman's contention is that the first two aggravating circumstances (murder in commission of kidnaping and murder in commission of criminal sexual penetration) should not have been set forth as two separate aggravating circumstances, but should have been presented to the jury in the

alternative.

Guzman claims that under Subsection 31-20A-5(B), the State may select one of the crimes listed or charge in the alternative, but to select two of them increases the number of crimes for which a defendant may be put to death, thereby unconstitutionally expanding the statutory grounds. However, we assume that when the Legislature used the conjunction "or", they intended that either of the crimes could be used as an aggravating circumstance, the basis from which the death penalty can be imposed. The fact that they are contained in one subsection of the statute is immaterial.

In any event, as previously stated in State v. Cheadle, when two or more aggravating circumstances are found, the invalidation of one will not invalidate the sentencing proceeding unless the invalidation is due to constitutionally protected conduct. See, e.g., Zant v. Stephens, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 235 (1983).

III. Mitigating v. Aggravating Circumstances.

Guzman asserts that the mitigating circumstances clearly outweighed the aggravating circumstances; therefore, a sentence of life imprisonment should have been imposed.

After considering the evidence, weighing the mitigating and aggravating circumstances, and unanimously finding that the aggravating circumstances existed, the jury unanimously agreed that Guzman should be sentenced to death on each of the aggravating circumstances. During the hearing concerning Guzman's motion for a new trial, the trial judge stated, "Had I, as trial judge been weighing the aggravating circumstances against the mitigating circumstances, I would have reached a different conclusion than the jury reached; and I would have imposed a life sentence."

The jury was presented with the facts and evidence. Seven mitigating circumstances were put forth to the jury. These mitigating circumstances included testimony concerning Guzman's extensive mental and emotional problems; however, the jury after weighing the mitigating and aggravating circumstances found that the seven mitigating circumstances did not outweigh the aggravating circumstances.

It is our duty as an appellate court to review the record, evidence, and determination of the jury. It is not our duty to re-try a case for what may be a better result. State v. Garcia. We are required to assure that a defendant is not put to death if the evidence would support a finding that the mitigating circumstances outweigh the aggravating circumstances. This is very difficult to do when a jury has weighed the evidence and determined that the death penalty is the appropriate penalty. In any event, the trial judge could not make such a ruling. A review of the evidence in this case supports the jury's determination. See State v. Cheadle.

IV. Dr. Ferraro's Testimony

Dr. Ferraro, a psychopharmacologist, was called by Guzman to testify concerning the quantity of medication and alcohol consumed by Guzman the evening of the murder. Guzman told Dr. Ferraro about this consumption two days prior to Dr. Ferraro's appearance at trial. At the time of Dr. Ferraro's testimony, there was no other evidence introduced during trial that Guzman had consumed any alcohol or taken medication the night of the murder.

The trial court was concerned with a hearsay problem and the factual basis of Dr. Ferraro's proposed opinion. The trial court allowed Dr. Ferraro to testify as an expert concerning a hypothetical question as to the medication and the effect of alcohol on this medication, but not as to what Guzman told him. The trial court, however, allowed Guzman to re-call Dr. Ferraro if the facts were placed in evidence.

NMSA 1978, Evid. R. 702 (Repl.Pamp.1983) provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. (emphasis added.)

Dr. Ferraro testified

hypothetically as to what effect the particular medication and alcohol would have on a person who had extreme emotional problems. The trial court did not allow Dr. Ferraro to testify as to what Guzman told him two days before trial about the medication and alcohol he had ingested the night of the murder. There was no "evidence" or "fact in issue" at the time the testimony was offered; and therefore, there was no foundation for the testimony that Guzman had taken medication and alcohol the night of the murder. The trial court correctly determined that Dr. Ferraro could not testify as to the particular effect on Guzman until the "evidence" or "fact in issue" was properly in evidence. **See State v. Elliott**, 96 N.M. 798, 635 P.2d 1001 (Ct.App.1981); **see also State ex rel. State Highway Department v. Fox Trailer Court**, 83 N.M. 178, 489 P.2d 1176 (1971). To allow otherwise would permit a defendant to offer testimony which he wishes to be admitted into evidence without it being subjected to cross-examination.

V. Proportionality Review

Guzman asserts that his sentence was excessive and/or disproportionate to the penalty imposed in similar cases.

The jury was instructed twice on the aggravating circumstances of Subsection 31-20A-5(B), and once on the aggravating circumstance of Subsection 31-20A-5(G). The jury unanimously found beyond a reasonable doubt that each of the three aggravating circumstances existed and that each aggravating circumstance warranted the death penalty.

In **State v. Garcia**, we set forth the guidelines for proportionality review. We have compared Guzman's sentence with the facts and sentences in the cases of **State v. Hutchinson**, 99 N.M. 616, 661 P.2d 1315 (1983), **State v. Gilbert**, 22 SBB 1173 (1983), **petition for cert. filed**, 52 U.S.L.W. ___ (U.S. Dec. 16,1983) (No. 83-5843), **State v. Cheadle**, and **State v. Simonson**, 22 SBB 1125 (1983). We do not find that Guzman's sentence was disproportionate to other appropriate "review" cases. We also find that Guzman's sentence was not excessive punishment for the crimes committed in this case.

Proportionality review in New Mexico is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. In reviewing the jury's determination, we will not re-try the case for what may be a better result. **State v. Garcia.**

VI. Passion and Prejudice of Jury

Guzman asserts three separate instances in which the jury was inflamed and impassioned. He cites no authority, but claims that the death penalty could not be imposed because the jury acted under the influence of passion or prejudice which would result in the imposition of the death penalty under arbitrary facts. After reviewing the record, we disagree.

The three instances Guzman asserts are: 1) at the conclusion of the trial evidence, the court reporter informed the trial judge and parties that a juror had seen Guzman's younger brother and a friend in the jury lounge more than once; 2) an affidavit of an attorney who was not involved in this case, stating that she was informed by the husband of a juror that he and his wife were terrified regarding their personal safety and that the husband was taking a pistol to work; and 3) a note from the jury that requested the trial judge provide an escort after the verdict at sentencing.

Concerning the first incident, after being advised that Guzman's brother and a friend were in the jury room to use vending machines, both were admonished to stay away from the jury room. At that point, Guzman requested a mistrial. The State requested the trial court to question and admonish the jury. The trial judge agreed to question and admonish the jury, but denied the mistrial motion. Guzman decided he wanted the matter ignored and did not want the jury either questioned or admonished.

Concerning the second incident, the record shows that this affidavit was filed June 18, 1982, a month after the trial was over. The affidavit stated that the attorney was informed during the recess of the trial, after verdict and before sentencing, that the juror and her husband were frightened for their personal safety and that the juror's husband was carrying a gun to

work because of this case. Counsel does not cite any authority for the proposition that somehow this shows that the jury acted under passion and prejudice.

Finally, counsel again claims, without citing authority to support the proposition, that the jury's request to be escorted out of the courthouse in a manner to avoid the television cameras and other news media showed that the jury decided the case under the influence of passion and prejudice.

We have reviewed the record of these incidents and determine that none of them, either together or individually, shows any passion or prejudice on behalf of the jury.

VII. Testimony of Expert Witnesses

Guzman called Dr. Reed and Dr. Fink to testify that in their opinion, Guzman's mental impairment alone should preclude him from receiving the death penalty. The trial court did not allow this testimony.

Throughout the trial, evidence was presented concerning Guzman's emotional and mental condition. The question of whether Guzman should receive the death penalty is a matter of fact to be decided by the trier of fact. NMSA 1978, Section 31-20A-1 (Repl.Pamp.1981).

As previously mentioned, Rule 702 provides in pertinent part: "[i]f . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert. . . may testify thereto. . . ." In the present case, the jury, having heard all the evidence, was qualified to decide this issue. Therefore, we determine that the trial court properly excluded the testimony of the expert witnesses on the issue of whether the death penalty should, in their opinion, be imposed.

VIII. Modification of Death Sentence

Guzman asserts that because the trial judge disagreed with the jury's imposition of the death penalty, he should have modified the sentence.

NMSA 1978, Subsection 31-20A-1(D) (Repl.Pamp.1981) provides:

> In a jury sentencing proceeding, the judge shall give appropriate instructions and allow argument and the jury shall retire to determine the punishment to be imposed. . . . (emphasis added.)

NMSA 1978, Section 31-20A-3 (Repl.Pamp.1981) provides in pertinent part:

> In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances . . . and unanimously specifies the sentence of death . . . the court shall sentence the defendant to death. (emphasis added.)

In a jury proceeding, the jury determines whether to impose the death penalty; the trial judge must abide by this determination. If the sentence is not properly imposed, it is up to the New Mexico Supreme Court to review the sentence. This Court, not the trial judge, automatically reviews the jury's decision to impose the death penalty. NMSA 1978, Section 31-20A-4 (Repl.Pamp.1981). The trial judge, therefore, correctly ruled that it had no authority to modify the death sentence in a jury proceeding.

VIII. Subsection 31-20A-6(H)

Guzman asserts that Subsect. 31-20A-6(H) is unconstitutional. Subsection 31-20A-6(H), states:

> The mitigating circumstances to be considered by the sentencing court or the jury pursuant to the provisions of Section 3[31-20A-2 NMSA 1978] of this act shall include but not be limited to the following:
>
> . . . .
>
> H. the defendant cooperated with authorities.

Guzman asserts that this mitigating circumstance has a chilling effect under the Fifth Amendment and Fourteenth Amendment on his right to remain silent. U.S. Const. amend. V and XIV. Guzman ignores UJI Crim. 39.30 requiring the submission of mitigating circumstances to the jury. The Use Note to UJI Crim. 39.30 points out that only those mitigating circumstances which are supported by evidence, are to be given. Therefore, a defendant who does not cooperate with the authorities is not affected. Guzman's argument is similar to arguing that it is unconstitutional to require a defendant to be cross-examined and

thereby impeached, if he desires to testify in his own defense. This proposition has been upheld. Jenkins v. Anderson, 447 U.S. 231 (1980). However, the jury in the present case was instructed that they should consider Guzman's cooperation with the authorities. Guzman was not penalized for his cooperation.

We find the statute constitutional.

CONCLUSION

After reviewing the record and transcript, we conclude that Guzman was properly convicted and that the death sentence was properly imposed. Therefore, the judgment of the jury that Guzman be punished by death is affirmed. This case is remanded to the trial court to set the date of execution not less than sixty nor more than ninety days from the date of the mandate on the judgment pursuant to NMSA 1978, Section 31-14-1.

IT IS SO ORDERED.

s/WILLIAM RIORDAN, Justice

WE CONCUR:
s/WILLIAM R. FEDERICI, Chief Justice
s/H. VERN PAYNE, Justice
s/HARRY E. STOWERS, JR., Justice

DAN SOSA, JR., Senior Justice, specially concurring on all issues except the issue of the imposition of death.

SPECIAL CONCURRENCE

DAN SOSA, JR., Senior Justice, specially concurring.

I concur with the affirmance of the defendant's convictions for the reasons stated in the majority opinion. However, I respectfully dissent as to the issue of the imposition of the death sentence. I would hold that New Mexico's death penalty statute is unconstitutional and would remand this cause for the imposition of a sentence of life imprisonment for the reasons stated in my specially concurring opinion in State v. Garcia, 99 N.M. 771, 664 P.2d 969, cert. denied, ____ U.S. ____, 103 S.Ct. 2464, 77 L.Ed.2d 1341 (1983).

s/DAN SOSA, JR., Senior Justice

From The New Mexico Supreme Court

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

BRYAN McCRARY and BART DEWAYNE BURDICK,
Defendants-Appellants.

No. 14652 (filed January 5, 1984)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
WILLIAM J. SCHNEDAR, District Judge

PAUL BARDACKE, Attorney General
BARBARA F. GREEN, Assistant Attorney General
Santa Fe, New Mexico
for Appellee

SARAH M. SINGLETON
Santa Fe, New Mexico
for Appellant McCrary

DAVID L. NORVELL
NORVELL & GLOVER
Albuquerque, New Mexico
for Appellant Burdick

OPINION

H. VERN PAYNE, Judge.

This appeal challenges the first degree murder convictions of Bryan McCrary and Bart D. Burdick.

McCrary had attended a carnival in Hobbs and felt he was cheated out of sixty-four dollars. He and Burdick decided they would get revenge by shooting the tires of the carnival trucks. Armed with two .22 caliber rifles, two 30-30 caliber rifles, a shotgun, and accompanied by William Sutton, they returned to the carnival site at 1:30 a.m.

With Burdick driving, the group contend they circled the area two to three times in a pick-up truck.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, February 23, 1984

NO. 14,450

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

MICHAEL ANTHONY GUZMAN,

Defendant-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellant for rehearing, and the Court having considered said motion and b[illegible] sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for rehearing is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERETE
CLERK OF THE SUPREME COURT

By [signature]
Deputy

GERALD R. COLE

SECOND JUDICIAL DISTRICT

1982 JUN 11 PM 4:02

State of New Mexico
Second Judicial District

CLERK

GERALD R. COLE
DISTRICT JUDGE
DIVISION EIGHT
(505) 842-3089

POST OFFICE BOX 488
ALBUQUERQUE, N.M. 87103

June 11, 1982

Ms. Kathleen Wright
Assistant District Attorney
415 Tijeras, NW
Albuquerque, NM 87102

Mr. Joseph Fine
Attorney at Law
812 Marquette, NW
Albuquerque, NM 87102

Dear Counsel:

Re: State of New Mexico vs. Michael Guzman, Cause Nos. 34084 and 34373

Defendant's motion for a new trial or alternative motion for sentence of life imprisonment not withstanding guilty verdict is denied.

The Court finds:

(1) The sentence was not the result of an inflamed or impassioned jury;

(2) the sentence is not cruel or unusual punishment on the grounds set forth in defendant's motion;

(3) UJI Criminal Instruction 39.33 as presented and argued to the jury by the state in this case and 31-20A-2 N.M.S.A. (1978) as applied in this case, meets the constitutional requirements of direction as set forth in Godfrey v. Georgia, 100 S.Ct. 1759 (1980), and similar cases;

(4) the state's use of pictures at both the trial and sentencing procedures was a very restrained use of such pictures, in that of the several hundred pictures available, those actually admitted were, if anything, a restriction on the state's case.

As to the other grounds set forth in the motion, they are without merit based upon the reasons set forth when similar rulings were made when the same matters were raised at trial.

The Court finds that it does not have authority under Rule 57, 1(a) of the New Mexico Rules of Civil Procedure to modify the sentence imposed by statute. Mandatory sentences have been held to be Legislative prerogative. The statute in question, 31-20A-3, provides for a mandatory sentence and would it violate the separation of power concept of our government to permit the Court by rule to modify that mandate.

The Court finds that UJI Criminal Instruction 39.13 is not confusing or erroneously written and that it was appropriate in this case to have the jury consider aggravating circumstances relative to both criminal sexual penetration and kidnapping. This is especially clear where one victim, Julie Ann Jackson, was raped and a second victim, Colleen Renee Bush, was kidnapped, both in the same incident in which the murder occurred.

The trial Court is not authorized to weigh the evidence in the sentencing phase of this jury trial to determine if the mitigating circumstances outweigh the aggravating circumstances or to determine that the death sentence is disproportionate to the crime for which the defendant was convicted. Both of these matters are granted to the Supreme Court under Section 31-20A-4C(2) and (4) N.M.S.A. (1978).

My reasoning is based upon proposition that the statutes require that the guilt and innocence portion and the sentencing portion of these trials be heard by the same jury except as provided in 31-20A-4D and E. In this case, I am well satisfied that the guilt of the defendant is clearly supported by the weight of the evidence, and it is only to the sentencing verdict that I would even consider granting a new trial. I find no authority for the trial Court to grant a new trial only as to the sentencing determination, and, in effect, bifurcate the trial by having different juries determine the guilt or innocence and the sentence. Section 31-20A-4(2) directs the Supreme Court to weigh the evidence on aggravating and mitigating circumstances and compare the sentence with other cases in its review, and the subsequent sub-sections permit that Court to remand as to the sentencing phase of the trial only. It would appear, therefore, that where a trial judge is satisfied with a guilty determination, exclusive jurisdiction to weigh evidence and grant a partial retrial only as to sentencing rests with the Supreme Court.

Had I, as trial judge, been weighing the aggravating circumstances against the mitigating circumstances, I would have reached a

different conclusion than the jury reached; and I would have imposed a life sentence. Compared to other death penalty cases tried in this judicial district, the only ones of which I am intimately familiar, those being Gilbert, Cheadle, and Garrison, I feel that the sentence of death in this case is disproportionate to the penalty imposed in those cases. I believe an expression of these opinions are appropriate; for I believe they can and should be considered by the Supreme Court in reviewing this case under 31-20A-4C(2) and (4).

Please submit the proper form of order within ten days.

Have a Happy Day,

GERALD R. COLE

GRC:daw

cc: Court File

GERALD R. COLE

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT SECOND JUDICIAL DISTRICT

1982 JUN -2 PM 2 12

STATE OF NEW MEXICO,

PLAINTIFF,

VS. NO. 34084 Criminal

MICHAEL ANTHONY GUZMAN,
DOB: 2-4-63
SS#: 585-06-2901

DEFENDANT.

JUDGMENT, SENTENCE AND COMMITMENT

This matter coming on for hearing on April 30, 1982, before the Honorable GERALD R. COLE, District Judge, Plaintiff appearing by RAY A. PADILLA and KATHLEEN ANNE WRIGHT, Assistant District Attorneys for the Second Judicial District, Defendant appearing personally and by his attorney, JOSEPH M. FINE, the Defendant having been convicted on April 28, 1982 pursuant to JURY VERDICTS accepted and recorded by the Court of the following crimes: WILLFUL, DELIBERATE, PREMEDITATED MURDER IN THE FIRST DEGREE and FELONY MURDER occurring on or between the 5th and 6th days of April 1981, contrary to §30-2-1(A), NMSA 1978, as charged in COUNT I; ATTEMPT TO COMMIT A FELONY, TO WIT: FIRST DEGREE MURDER, occurring on or between the 5th and 6th days of April 1981, contrary to §§ 30-28-1 and 30-2-1(A), NMSA 1978, as charged in COUNT II; CRIMINAL SEXUAL PENETRATION IN THE SECOND DEGREE, occurring on or between the 5th and 6th days of April 1981, contrary to § 30-9-11(B), NMSA 1978, as charged in COUNT III; KIDNAPPING JULIE ANN JACKSON, occurring on or between the 5th and 6th days of April 1981, contrary to §30-4-1, NMSA 1978, as charged in COUNT IV; KIDNAPPING COLENE RENEE BUSH, occurring on or between the 5th and 6th days of April 1981, contrary to §30-4-1, NMSA 1978, as charged in COUNT V; and TAMPERING WITH EVIDENCE, occurring on or between the 5th and 8th days of April 1981, contrary to §30-22-5, NMSA 1978, as charged in COUNT VI.

413

Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced as follows: COUNT I: The Defendant is sentenced to death in the manner prescribed by law pursuant to Section 3(31-20A-2, NMSA 1978); COUNT II: Nine (9) years imprisonment; COUNT III: Nine (9) years imprisonment; COUNT IV: Eighteen (18) years imprisonment; COUNT V: Eighteen (18) years imprisonment; and COUNT VI: Eighteen (18) months imprisonment, neither aggravating nor mitigating circumstances having been found with regard to COUNTS II through VI. COUNTS I,II,III and IV are to run CONSECUTIVE to each other, and COUNTS V and VI are to run CONCURRENTLY with each other and with COUNTS I,II,III and IV.

FURTHERMORE, the Court finds and adjudges the Defendant guilty of the commission of statutory aggravating circumstances as charged in COUNT I (murder committed during the course of kidnapping and/or criminal sexual penetration, and murder of a witness to a crime), pursuant to §31-20A-5B, 31-20A-5F, 31-18-14, and 31-20A-1, NMSA as amended.

AND FURTHERMORE, the sentence of death in COUNT I is pursuant to the jury findings and verdict rendered in Open Court pursuant to the sentencing proceedings herein.

THEREFORE, You, the Sheriff of Bernalillo County, New Mexico, are hereby commanded to take the above-named Defendant in custody and deliver him together with this Commitment to the custody of the Warden of the Penitentiary of the State of New Mexico, and there to execute this judgment on the 3rd day of July, 1982 in the manner provided by law.

DISTRICT JUDGE

Court Reporter: ROGER PROCTER

APPROVED:

RAY A. PADILLA
Assistant District Attorney

and

KATHLEEN ANNE WRIGHT
Assistant District Attorney

JOSEPH FINE
Attorney for Defendant

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs. No. 34084 Criminal

MICHAEL ANTHONY GUZMAN,

Defendant.

O R D E R

Defendant's motion for a new trial or alternative motion f sentence of life imprisonment having come on for hearing, the ɔurt having heard the arguments of counsel and being fully advised on the premises, it is ORDERED:

That the motion be and hereby is denied for the reasons set forth in the attached letter.

GERALD R. COLE

UJI Crim. 39.32. Death penalty sentencing proceeding; jury procedure for consideration of aggravating circumstances.[1]

You must decide the issues in this case solely on evidence admitted by the court during the trial in which the defendant was found guilty of murder and such additional evidence as may have been presented during this sentencing proceeding. You must not consider anything you may have read or heard about the case outside the courtroom.

You must first consider whether the aggravating circumstance(s) charged were present in this case. An aggravating circumstance must be proved beyond a reasonable doubt. If you have a reasonable doubt as to whether an aggravating circumstance is present, it is your duty to find that it is not present.

[You must decide separately as to each of the aggravating circumstances charged in this case. If you cannot agree upon your finding as to all of the aggravating circumstances but can agree as to one [or more] of them, you must make your finding as to the one [or more] upon which you do agree.][2]

In order to find an aggravating circumstance, you must agree unanimously.

A special finding form has been prepared for you for the aggravating circumstance(s) charged. For each aggravating circumstance upon which you have reached unanimous agreement, you shall complete the first part of the finding form indicating that the aggravating circumstance was found and having the foreman sign this part. If you cannot unanimously agree that the state has proved to your satisfaction beyond a reasonable doubt that an aggravating circumstance was present, you shall complete the first part of the finding form indicating that the aggravating circumstance was not unanimously agreed upon and having the foreman sign this part.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use only applicable bracketed language. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

Committee commentary. — At least one aggravating circumstance must be proved beyond a reasonable doubt to impose the death penalty. Gregg v. Georgia, 428 U.S. 153 (1976). 31-20A-3 NMSA 1978.

This instruction provides the procedure for finding an aggravating circumstance and for completing the form in UJI Criminal 39.34 as to the presence of one or more aggravating circumstances.

The 1981 amendment renumbered this instruction which was formerly 39.22.

UJI Crim. 39.33. Death penalty proceeding; jury procedure for considering penalty to be imposed.[1]

If you have unanimously agreed on a finding that [the aggravating circumstance charged was] [one or more of the aggravating circumstances charged were][2] present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against [the aggravating circumstance] [one or more aggravating circumstances][2] you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court.

You shall now retire to the jury room and select one of you to act as foreman. That person will preside over your deliberations and will speak for the jury here in court.

Any findings and any verdict you reach in this case must be signed by your foreman on the form that will be provided and then you shall return with it to this courtroom.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding.
2. Use only applicable bracketed alternative. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

Committee commentary. — Section 31-20A-2 NMSA 1978 requires the trier of fact to determine if mitigating circumstances exist and to weigh them against the aggravating circumstances. The weight to be given to the mitigating and aggravating circumstances and the burden of proof for each are not provided in the statute. Aggravating circumstances must be proven beyond a reasonable doubt and it is assumed that mitigating circumstances must be proven only by a preponderance of evidence. It is not necessary for the aggravating circumstances to outweigh the mitigating circumstances. The only requirement in the statute regarding this weighing process is that the death penalty must not be imposed if the mitigating circumstances outweigh the aggravating circumstances.

It also requires the trier of fact to consider the defendant and the crime. A consideration of the defendant would include his character and background. These considerations would be in addition to the specific mitigating circumstances identified in 31-20A-6 NMSA 1978. The jury's consideration of the crime is assumed to mean a consideration of the circumstances of the defendant's crime.

The committee concluded that the jury may select a new foreman even though the jury hearing the sentencing proceeding was the same jury which heard the main case or if the same jury, it may select the same person as foreman again.

The 1981 amendment renumbered this instruction which was formerly 39.23.

UJI Crim. 39.34. Death penalty sentencing proceeding; sample forms of findings; aggravating circumstance findings; penalty findings.[1]

(style of case)

(circle appropriate alternative)

(We unanimously find) (we do not unanimously find) beyond a reasonable doubt the aggravating circumstance of . . . . . as charged.
set forth the aggravating circumstance

. . . . . .
FOREMAN

We unanimously agree that the defendant, ... , should be sentenced to death
name of defendant
in the manner provided by law.

. . . . . .
FOREMAN

DO NOT SIGN ON THIS LINE UNLESS THE JURY HAS FOUND AN AGGRAVATING CIRCUMSTANCE AND YOU HAVE SO INDICATED BY COMPLETING THE PART ABOVE AND SIGNING YOUR NAME ABOVE.

We do not unanimously agree that the defendant, ... , should be sentenced to
name of defendant
death in the manner provided by law.

. . . . . .
FOREMAN

Use Note

1. This instruction is for use only in death penalty sentencing proceedings. The court is to set forth the aggravating circumst-nces on this form prior to submission to the jury. A separate form is to be submitted for each aggravating circumstance to be submitted to the jury. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

ARTICLE 20A

Capital Felony Sentencing

Sec.
31-20A-1. Capital felony; sentencing procedure.
31-20A-2. Determination of sentence.
31-20A-3. Court sentencing.
31-20A-4. Review of judgment and sentence.
31-20A-5. Aggravating circumstances.
31-20A-6. Mitigating circumstances.

31-20A-1. Capital felony; sentencing procedure.

A. At the conclusion of all capital felony cases heard by jury, and after proper charge from the court and argument of counsel, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital felony cases, the judge shall first consider a finding of guilty or not guilty without any consideration of punishment.

B. Upon a verdict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized herein. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial the sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty to a capital felony, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of a party.

C. In the sentencing proceeding, all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances pursuant to Sections 6 [31-20A-5 NMSA 1978] and 7 [31-20A-6 NMSA 1978] of this act.

D. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow argument and the jury shall retire to determine the punishment to be imposed. In a nonjury sentencing proceeding, or upon a plea of guilty, where no jury has been demanded, the judge shall allow argument and determine the punishment to be imposed.

History: Laws 1979, ch. 150, § 2.

31-20A-2. Determination of sentence.

A. Capital sentencing deliberations shall be guided by the following considerations:

(1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act;

(2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and

(3) whether other mitigating circumstances exist.

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

History: Laws 1979, ch. 150, § 3.

31-20A-3. Court sentencing.

In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act, and unanimously specifies the sentence of death pursuant to Section 3 [31-20A-2 NMSA 1978] of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the jury does

31-20A-6. Mitigating circumstances.

The mitigating circumstances to be considered by the sentencing court or the jury pursuant to the provisions of Section 3 [31-20A-2 NMSA 1978] of this act shall include but not be limited to the following:

A. the defendant has no significant history of prior criminal activity;

B. the defendant acted under duress or under the domination of another person;

C. the defendant's capacity to appreciate the criminalty [criminality] of his conduct or to conform his conduct to the requirements of the law was impaired;

D. the defendant was under the influence of mental or emotional disturbance;

E. the victim was a willing participant in the defendant's conduct;

F. the defendant acted under circumstances which tended to justify, excuse or reduce the crime;

G. the defendant is likely to be rehabilitated;

H. the defendant cooperated with authorities; and

I. the defendant's age.

History: Laws 1979, ch. 150, § 7.

Effective dates. — Laws 1979, ch. 150, § 13, makes the act effective on July 1, 1979.

Severability clauses. — Laws 1979, ch. 150, § 12, provides for the severability of the act if any part or application thereof is held invalid.

Temporary provisions. — Laws 1979, ch. 150, § 11, provides that the supreme court of New Mexico shall promulgate rules prior to the effective date of the act to regulate the procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of juror or trial judge before whom a capital fe sentencing proceeding has commenced pursuant the act.

31-20A-5. Aggravating circumstances.

The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following:

A. the victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered;

B. the murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration;

C. the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;

D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico. As used in this subsection "penal institution" includes facilities under the jurisdiction of the corrections and criminal rehabilitation department [corrections department] and county and municipal jails;

E. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department];

F. the capital felony was commited for hire; and

G. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

History: Laws 1979, ch. 150, § 6; 1981, ch. 23, § 1.

The 1981 amendment substituted "Section 31-20A-2 NMSA 1978" for "Section 3 of this act" in the introductory paragraph, added present Subsection D, redesignated former Subsections D, E and F as present Subsections E, F and G, and substituted "corrections and criminal rehabilitation department" for "corrections division" at the end of Subsection E.

Emergency clause. — Laws 1981, ch. 23, § 3, makes the act effective immediately. Approved March 17, 1981.

Applicability. — Laws 1981, ch. 23, § 2, makes the act applicable only to persons sentenced for crimes committed on or after its effective date.

Corrections department. — Laws 1981, ch. 73, § 1, changed the name of the former corrections and criminal rehabilitation department, referred to in Subsections D and E, to the corrections department. See 9-3-3 NMSA 1978.

UJI Crim. 39.20. Death penalty sentencing proceeding; aggravating circumstances; murder of a witness; essential elements.[1]

Before you may find the aggravating circumstance of murder of (a witness to a crime)[2] (a person likely to become a witness to a crime), you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

[1. ..... was (a witness to a crime)[2] (likely to become a witness to a crime);
name of victim

and

2. ..... was murdered to prevent ..... from (reporting the
name of victim name of victim
crime)[2] (testifying in a criminal proceeding)][3]

[OR][3]

[..... was murdered as retaliation for his having testified in a criminal
name of victim
proceeding.]

[AND][4]

[3. The defendant was 18 years of age or older at the time .....
name of victim
murdered.][4]

Use Note

1. This instruction may only be used in a death penalty sentencing proceeding.
2. Use only the applicable alternative.
3. Use only the applicable bracketed alternative.
4. Use bracketed language upon request if sufficient evidence has been presented to raise an issue as to whether the defendant had reached the age of majority at the time the murder was committed. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

Statutory reference. — Section 31-20A-5G NMSA 1978.

Committee commentary. — Subsection F [Subsection G] of Section 31-20A-5 NMSA 1978 has been broken into two alternatives: murder of a witness to prevent the report of a crime or testimony in a criminal proceeding and murder of a witness in retaliation for the witness having testified in a criminal proceeding. For a discussion of "a person likely to become a witness to a crime," see State v. Bell, 78 N.M. 317, 431 P.2d 50 (1967).

The legislature intended to provide for the protection of a witness in any case. Therefore, an intent to kill is not required, and there can be transferred intent in this aggravating circumstance. In some cases a person could be killed during the commission of a crime, and the defendant could be prosecuted for having killed a person likely to become a witness to a crime. In such cases there must be some specific evidence independent of crime. This is a matter of proof as to motive.

In those cases where the defendant intended only to intimidate the witness and not to kill him, it will be necessary to instruct on intimidation of a witness. As there is no essential elements instruction on intimidation of a witness, it will be necessary to draft an appropriate instruction. See 30-24-3 NMSA 1978 for the essential elements. If the jury was instructed on this subject previously, it is not necessary to give such an instruction during this sentencing proceeding.

See also committee commentary to UJI Criminal 39.13 and 39.14.

The 1981 amendment renumbered this instruction which was formerly 39.19.

UJI Crim. 39.21 to 39.24. Renumbered.

Compiler's notes. — New Mexico U.J.I. Crim. 39.21 to 39.24 were renumbered in 1981 as N.M.U.J.I. Crim. 39.31 to 39.34.

UJI Crim. 39.30. Death penalty proceeding; mitigating circumstances.[1]

Before determining the penalty to be imposed, you should consider any of the following mitigating circumstances you find to exist:[2]

[the defendant did not have any significant history of prior criminal activity];
[the defendant acted under duress or under the domination of another person];
[the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired];
[the defendant was under the influence of mental or emotional disturbance];
[the victim was a willing participant in the defendant's conduct];
[the defendant acted under circumstances which tended to justify, excuse or reduce the crime];
[the defendant is likely to be rehabilitated];
[cooperation by the defendant with authorities]; and
[the defendant's age].

You should also consider any other circumstances which you find to be mitigating.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding.
2. Use only the bracketed alternative mitigating circumstances for which there is sufficient evidence. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

Committee commentary. — Section 31-20A-6 NMSA 1978 sets forth mitigating circumstances which should be considered by a judge in a proceeding in which a jury trial is waived or by the jury in a capital felony case prior to deciding whether the defendant should be punished by a penalty of death or life imprisonment. Any other mitigating circumstances found to exist should also be considered.

After finding that there are certain mitigating circumstances, the trier of fact must then weigh them against any aggravating circumstances which it found.

See also committee commentary to UJI Criminal 39.33.

The 1981 amendment renumbered this instruction which was formerly 39.20.

UJI Crim. 39.31. Death penalty sentencing proceeding; reasonable doubt; burden of proof.[1]

The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged and that the mitigating circumstances do not outweigh the aggravating circumstances.

It is not required that the state prove this beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense — the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

Use Note

1. This instruction must be given in all death penalty sentencing proceedings. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

Committee commentary. — This instruction must be given in death penalty sentencing proceedings instead of UJI Criminal 40.60.

The aggravating circumstances are required to be proved by the state beyond a reasonable doubt. 31-20A-3 NMSA 1978. In Gregg v. Georgia, 428 U.S. 153 (1976), the court approved instructions to the jury which required the jury to find beyond a reasonable doubt that the aggravating circumstances were present.

The 1981 amendment renumbered this instruction which was formerly 39.21.

UJI Crim. 39.13. Death penalty sentencing proceeding; aggravating circumstances.[1]

The state has charged that the murder of .....
name of deceased
was committed under the following aggravating circumstance(s):[2]

[the murder was of a peace officer who was performing his duties];

[AND][3]

[the murder was committed during (the commission of)[4] (an attempt to commit) (kidnapping)[4] (criminal sexual contact of a minor) (criminal sexual penetration)];

[AND]

[the murder was committed while attempting to escape from a penal institution];

[AND]

[the murder was of (an inmate)[4] (person lawfully on the premises) of a penal institution];

[AND]

[the murder was of an employee of the corrections division];

[AND]

[the murder was for hire];

[AND]

[the murder was of (a witness to a crime)[4] (a person likely to become a witness to a crime)].

[A separate instruction will now be given to you for each of these aggravating circumstances.][5]

Use Note

1. This instruction must be given in every death penalty sentencing proceeding after all the evidence has been completed. The appropriate aggravating circumstance instruction(s) for which there is sufficient evidence must be given after this instruction. A separate instruction must be given for each murder committed. See UJI Criminal 39.13 through 39.20.
2. Use only the applicable bracketed phrase(s).
3. Use only if more than one aggravating circumstance is charged.
4. Use only the applicable alternative(s).
5. Use the bracketed material only if there are multiple aggravating circumstances.

[Adopted, effective July 1, 1979; as amended, effective March 17, 1981.]

Committee commentary. — Section 31-20A-5 NMSA 1978 sets forth aggravating circumstances to be considered by a judge in a proceeding in which a jury trial is waived or by the jury in a capital felony case prior to deciding whether the defendant should be punished by a penalty of death or life imprisonment. Some of the aggravating circumstances set forth in Section 31-20A-5 NMSA 1978 are actually specific types of felony murder. The jury therefore may have already considered most of the elements of an aggravating circumstance during its deliberations of a verdict charging felony murder. The jury must unanimously find beyond a reasonable doubt one or more of the aggravating circumstances set forth in Section 31-20A-5, supra.

The committee was of the opinion that 31-20A-5 NMSA 1978 is open to interpretation, and since there is no prior case law in New Mexico on the death penalty as currently drafted, these instructions have been drafted as interpreted by the committee. Also, certain situations are not covered by these instructions, such as transferred intent, and modification may be necessary. Where the defendant was convicted as an accessory to murder, it is for the jury to decide whether or not he should be sentenced to death. For this reason, the committee has not included this situation in the instructions.

The committee felt that there was an ambiguity in 31-20A-5 NMSA 1978 regarding intent, such as whose intent is necessary and whether transferred intent is possible. It was felt that the legislature intended that the death penalty should not be imposed in certain types of felony murder, and thus, it must be proved that the defendant had the intent to kill as required by UJI Criminal 2.00, first degree murder.

The 1981 amendment added superscript "1" to the catchline; added the fifth paragraph of the instruction, and substituted "39.20" for "39.18" at the end of Use Note 1.

Compiler's notes. — Laws 1980, ch. 150, § 3, renames the former criminal justice department as the corrections and criminal rehabilitation department and renames the former corrections division within that department as the adult institutions division. Laws 1981, ch. 73, § 3 renames the former corrections and criminal rehabilitation department as

not make the required finding, or the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment. In a nonjury sentencing proceeding and in cases involving a plea of guilty, where no jury has been demanded, the judge shall determine and impose the sentence, but he shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act.

History: Laws 1979, ch. 150, § 4.

31-20A-4. Review of judgment and sentence.

A. The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.

B. In addition to the other matters on appeal, the supreme court shall rule on the validity of the death sentence.

C. The death penalty shall not be imposed if:

(1) the evidence does not support the finding of a statutory aggravating circumstance;

(2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;

(3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or

(4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. No error in the sentencing proceeding shall result in the reversal of the conviction of a capital felony. If the trial court is reversed on appeal because of error only in the sentencing proceeding, the supreme court shall remand solely for a new sentencing proceeding. The new sentencing proceeding ordered and mandated shall apply only to the issue of punishment.

E. In cases of remand for a new sentencing proceeding, all exhibits and a transcript of all testimony and other evidence admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding, and:

(1) if the sentencing proceeding was before a jury, a new jury shall be impaneled for the new sentencing proceeding;

(2) if the sentencing proceeding was before a judge, the original trial judge shall conduct the new sentencing proceeding; or

(3) if the sentencing proceeding was before a judge and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, then another judge shall be designated to conduct the new sentencing proceeding and the parties are entitled to disqualify the new judge on the grounds set forth in Section 38-3-9 NMSA 1978 before the newly designated judge exercises any discretion.

History: Laws 1979, ch. 150, § 5.

31-20A-5. Aggravating circumstances.

The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following:

A. the victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered;

B. the murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration;

C. the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;

D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the

[the defendant did not have any significant history of prior criminal activity];
[the defendant acted under duress or under the domination of another person];
[the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired];
[the defendant was under the influence of mental or emotional disturbance];
[the victim was a willing participant in the defendant's conduct];
[the defendant acted under circumstances which tended to justify, excuse or reduce the crime];
[the defendant is likely to be rehabilitated];
[cooperation by the defendant with authorities]; and
[the defendant's age].

You should also consider any other circumstances which you find to be mitigating.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding.
2. Use only the bracketed alternative mitigating circumstances for which there is sufficient evidence. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

Committee commentary. — Section 31-20A-6 NMSA 1978 sets forth mitigating circumstances which should be considered by a judge in a proceeding in which a jury trial is waived or by the jury in a capital felony case prior to deciding whether the defendant should be punished by a penalty of death or life imprisonment. Any other mitigating circumstances found to exist should also be considered.

After finding that there are certain mitigating circumstances, the trier of fact must then weigh them against any aggravating circumstances which it found.

See also committee commentary to UJI Criminal 39.33.

The 1981 amendment renumbered this instruction which was formerly 39.20.

UJI Crim. 39.31. Death penalty sentencing proceeding; reasonable doubt; burden of proof.[1]

The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged and that the mitigating circumstances do not outweigh the aggravating circumstances.

It is not required that the state prove this beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense — the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

Use Note

1. This instruction must be given in all death penalty sentencing proceedings. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

Committee commentary. — This instruction must be given in death penalty sentencing proceedings instead of UJI Criminal 40.60.

The aggravating circumstances are required to be proved by the state beyond a reasonable doubt. 31-20A-3 NMSA 1978. In Gregg v. Georgia, 428 U.S. 153 (1976), the court approved instructions to the jury which required the jury to find beyond a reasonable doubt that the aggravating circumstances were present.

The 1981 amendment renumbered this instruction which was formerly 39.21.

INSTRUCTION NO. 7

Before determining the penalty to be imposed, you should consider any of the following mitigating circumstances you find to exist:

the defendant did not have any significant history of prior criminal activity;

the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired;

the defendant was under the influence of mental or emotional disturbance;

the defendant acted under circumstances which tended to reduce the crime;

the defendant is likely to be rehabilitated;

cooperation by the defendant with authorities; and

the defendant's age.

You should also consider any other circumstances which you find to be mitigating.

AGGRAVATING VERSUS MITIGATING CIRCUMSTANCES

	MITIGATING CIRCUMSTANCES		AGGRAVATING CIRCUMSTANCES
1.	Age.	1.	Murder during a kidnapping.
2.	Cooperation with authorities.	2.	Murder during criminal sexual penetration.
3.	Lack of significant criminal history.	3.	Murder of a witness.
4.	Under influence of mental or emotional disturbance.		
5.	Impaired ability to conform conduct to requirements of the law.		
6.	Likely to be rehabilitated.		
7.	Acted under circumstances which tended to reduce the crime.		
8.	Remorse (nonstatutory).		

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

-versus- No. 14,450

MICHAEL ANTHONY GUZMAN,

Defendant-Appellant.

M O T I O N

Comes now MICHAEL ANTHONY GUZMAN, by and through his counsel of record, JOSEPH M. FINE, and respectfully requests the Court to order the Attorney General to produce the following material relating to each individual who has been charged with a capital felony in New Mexico.

1. The case-number and name of such individual;

2. A precise description of the crime such indivi al was accused of committing, including but not limited to all aggravating circumstances;

3. A description of such individual in terms of the aggravating and migitating circumstances pursuant to Sections 31-20A-5 and 6; and

4. The actual sentence of such individual.

In support of this Motion, the Movant states that:

1. MICHAEL ANTHONY GUZMAN has received a sentence of death;

2. Section 31-20A-4C(4) states that the sentence of death shall not be imposed if:

> The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

3. Section 31-20A-4C(4) is particularly relevant in the case-at-hand in that in Judge Cole's Order of July 7, 1982, which incorporated his letter of June 11, 1982, Judge Cole specifically stated that:

> Compared to other death penalty cases tried in this judicial district, the only ones of which I am intimately familiar, those being Gilbert, Cheadle and Garrison, I feel that the sentence of death in this case is disproportionate to the penalty imposed in those cases. I believe an expression of these opinions are appropriate; for I believe they can and should be considered by the Supreme Court in reviewing this case under 31-20A-4C(2) and (4).

4. In the absence of records regarding other capital

cases, the Movant is unable to adequately prepare for a judicial review under Section 31-20A-4C(4).

5. It is not feasible for the Movant to acquire data regarding every capital case in New Mexico without the assistance of the Court and the Attorney General.

WHEREFORE, the Movant respectfully requests that the Attorney General be required to provide the necessary information regarding capital cases or that the Court implement an alternative method for providing such information to the Movant.

Respectfully submitted,

JOSEPH M. FINE
Attorney for Defendant
812 Marquette, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-4541

I hereby certify that a true copy of the foregoing was sent to opposing counsel of record this 14th day of December, 1982.

BY: _____
JOSEPH M. FINE

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, December 29, 1982

NO. 14,450

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

MICHAEL ANTHONY GUZMAN,

Defendant-Appellant.

RECEIVED JAN 14 1982

Bernalillo County

This matter coming on for consideration by the Court upon Motion of Appellant to produce, and the Court having considered said motion and response of Appellee, and having heard oral argument and now being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion to produce is hereby denied.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico

INSTRUCTION NO. 12

If you have unanimously agreed on a finding that one or more of the aggravating circumstances charged were present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidenc admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against one or more aggravating circumstances you have found in this case. After weighing the aggravatin circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by t court.

You shall now retire to the jury room and select one of you to act as foreman. That person will preside over your deliberations and will speak for the jury here in court.

Any findings and any verdict you reach in this case must be signed by your foreman on the form that will be provided and then you shall return with it to this courtroom.

MATERIAL JURY MAY HAVE CONSIDERED
BASED ON THE EVIDENCE WHEN
CONSIDERING "THE DEFENDANT"

THE DEFENDANT

1. Mr. Guzman's Spanish heritage.

2. Mr. Guzman's religion.

3. Mr. Guzman's nervous appearance.

4. Mr. Guzman's low intelligent quotient.

5. The fact that Mr. Guzman may want to die.

6. The fact that Mr. Guzman's wife and child may be "better off" without him.

INSTRUCTION NO. 3

The state has charged that the murder of Julie Ann Jackson committed under the following aggravating circumstances:

the murder was committed during the commission of kidnapping

AND

the murder was committed during the commission of Criminal Sexual Penetration;

AND

the murder was of a witness to a crime or person likely to become a witness to a crime.

A separate instruction will now be given to you for each of these aggravating circumstances.

THREE ALTERNATIVES FOR MODIFYING
UJI CRIM. 39.33

After weighing the aggravating circumstances and the mitigating circumstances against either other, and considering both the defendant and the crime as additional mitigating factors, you shall shall determine whether the defendant should be sentenced to death or life imprisonment.

or:

After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, you shall determine whether the defendant should be sentenced to death or life imprisonment.

or:

After weighing the aggravating circumstances and the mitigating circumstances against each other, and considering both the defendant and the crime to determine which mitigating and aggravating factors are present, you shall determine whether the defendant should be sentenced to death or life imprisonment.

Proportionality guidelines from State v. Garcia, 99 NM 771, 664 P.2d 969 (1983), cert. denied, ____ U.S. ____, 103 S.Ct. 2464 (1983).

ing both the crime and the defendant". We assume that the Legislature means that in similar cases, considering both the crime and defendant, a defendant convicted of first degree murder under a specific aggravated circumstance should not be put to death if another defendant or other defendants, convicted of murder under the same aggravated circumstance is given life imprisonment, unless there is some justification. Therefore, we adopt the following guidelines for review under this Section.

1. We will review this issue only when raised on appeal.

2. In our review, we will consider only New Mexico cases in which a defendant has been convicted of capital murder under the *same aggravating circumstance(s).*[11]

3. Only those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received *either* the death penalty *or* life imprisonment and whose conviction and sentence have been upheld previously by this Court, will be considered appropriate for comparison.

4. We will review the record and compare the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate.

[15–17] In adopting these guidelines, we have reviewed the United States Supreme Court opinions that have discussed the issue of proportionality. *Gregg v. Georgia, supra,* which first upheld the constitutionality of the death penalty, addressed the issue of excessiveness of the punishment in relation to the death penalty. Under *Gregg,* a review of the punishment in the abstract, rather than in the particular, is to be considered when inquiring into excessiveness. Two aspects must be considered in determining whether a punishment is excessive and unconstitutional.[12] *Coker v. Georgia,* 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977), stated the requirements of *Gregg* as follows:

> (1) [The punishment] makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or
>
> (2) [the punishment] is grossly out of proportion to the severity of the crime.

When reviewing a sentence under this test, the Court pointed out that a judgment under such a review should not be, or appear to be, merely the subjective views of an individual Justice; rather, the Justices have a duty to review the case on an objective level. *Coker v. Georgia, supra.* Whatever our own personal beliefs may be, the government of the States of the Union are, "government[s] of laws, and not of men." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). Attention must also be given to the public attitudes concerning a particular sentence and to its history, precedent, legislative attitudes and the responses of the jurors. *Coker v. Georgia, supra. Gregg* did such an analysis in determining that the death penalty for a deliberate murder was neither a purposeless imposition of a severe punishment nor grossly disproportionate for the crime.

The United States Supreme Court in *Gregg* found that the imposition of the death penalty for the crime of murder had a long history of acceptance in the United States and England. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every state. The United States Supreme Court repeatedly has recognized the appropriateness of the death penalty. *Trop v. Dulles,* 356 U.S. 86, 99, 78 S.Ct. 590, 597, 2 L.Ed.2d 630 (1958) (Chief Justice Warren

11. It is the duty of the defendant's attorney to supply the Court with information of similar cases. Such information is of public record. §§ 14-3-1 through 14-3-25, N.M.S.A.1978 (Orig. and Cum.Supp.1982).

12. The cruel and unusual punishment clause of the Eighth Amendment is directed, in part, against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged. *Enmund v. Florida,* — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ANTHONY GUZMAN,

Petitioner,

-versus-

No. 83-6636

STATE OF NEW MEXICO,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The undersigned attorney, on behalf of the petitioner in this case, hereby moves that MICHAEL ANTHONY GUZMAN be allowed to proceed in forma pauperis before this Court. The reasons are set forth in the attached affidavit. Leave to proceed as an indigent for purposes of the appeal to the New Mexico Supreme Court was given by the trial judge on August 4, 1982.

Respectfully submitted,

JOSEPH M. FINE
Attorney for Petitioner
812 Marquette, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-4541

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OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ANTHONY GUZMAN,

Petitioner,

-versus-

No. 83-6636

STATE OF NEW MEXICO,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, MICHAEL ANTHONY GUZMAN, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source: No.

3. Do you own any cash or checking or savings accounts? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalities for perjury.

MICHAEL ANTHONY GUZMAN

Subscribed and sworn to before me this 18th day of April, 1984.

NOTARY PUBLIC

OFFICIAL SEAL
APOLONIO B. SENA
NOTARY PUBLIC - STATE OF NEW MEXICO
My Commission Expires 12/10/87

My Commission Expires:

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUSTICE

FILED
MAY 23 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-6636

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

MICHAEL ANTHONY GUZMAN

Petitioner

V.

THE STATE OF NEW MEXICO

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

PAUL BARDACKE
Attorney General

ANTHONY TUPLER
Assistant Attorney General

Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6929

I N D E X

	Page No.
Preliminary Statement	i
Summary of Argument	ii
POINT I	1
POINT II	3
POINT III	6
CONCLUSION	9

TABLE OF AUTHORITIES

New Mexico Cases Cited:

State v. Garcia, 99 N.M. 771, 664 P.2d 696 (1983), cert. denied, 102 S.Ct. 2464 (1983)	3,4
State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983)	5
State v. Simonson, ___ N.M. ___ 669 P.2d 1092 (1983)	5

Federal & United States Cases Cited:

Eddings v. Oklahoma, 455 U.S. 104, (1982)	1
Fuller v. Oregon, 417 U.S. 40 (1974)	3,7
Lockett v. Ohio, 438 U.S. 586, (1978)	1
Pulley v. Harris, ___ U.S. ____, 79 L.Ed.2d 29 (1984)	3
Zant v. Stephens, ___U.S. ___, 77 L.Ed.2d 235, (1983)	1

New Mexico Rules & Statutes Cited:

Supreme Court Rule 17	1,2, 5,7,8

PRELIMINARY STATEMENT

Respondent State of New Mexico pursuant to Supreme Court Rule 34.2, does not deem a separate statement of the case nor the noted exceptions in the foregoing rule necessary for inclusion in this Brief in Opposition. Petitioner adequately sets out those matters required by Supreme Court Rule 34.1.

SUMMARY OF ARGUMENTS

POINT I

The issue of whether due process is violated by the failure of the jury instruction to provide guidelines or standards that the phrase, "...considering the defendant and the crime..." applies only in mitigation is without merit and should not be reviewed by this Court. This Court has previously addressed the issue. The New Mexico Supreme Court correctly decided the issue. Petitioner's various claims of what the jury might have considered this phrase to mean is speculation without any factual record to support the allegations.

POINT II

The issue of whether the consideration of other cases assertedly outside the published guidelines established by the New Mexico Supreme Court for proportionality review violated due process and right to counsel is without merit and should not be reviewed. Petitioner has not challenged the other cases utilized in proportionality review in the state courts. Proportionality review is not constitutionally required. Nor was defense counsel denied the information necessary to argue proportionality review.

POINT III

The issue of whether constitutional error occurred when one aggravating circumstance was purportedly expanded into two aggravating circumstances is without merit and does not merit review by this Court. The jury found all three "means" of aggravation to be established beyond a reasonable doubt. Thus, whether the "means" constituted two or three aggravating circumstances is irrelevant. Petitioner did not and does not now challenge the evidentiary sufficiency of any of the three "means" of aggravation. The New Mexico Supreme Court correctly decided the legislative intent of the aggravation statute. That interpretation does not raise an issue of constitutional significance.

POINT I

Petitioner asserts a violation of due process to instruct the jury to "consider the defendant and the crime" without any standard or guidelines by which to consider those factors. (Pet., 9-17). He contends that because the jury instruction did not limit "considering the Defendant and the crime" to mitigation only, this omission afforded the jury license to consider those factors in aggravation.

This question does not warrant review by this Court. the issue has been adequately addressed by previous decisions of this Court. Secondly, the New Mexico Supreme Court correctly decided this question. Thirdly, the various assertions that the jury could have considered a variety of non-statutory factors in aggravation rather than mitigation is sheer speculation.

The previous decisions of this Court have made unalterably clear the individualized consideration of "the defendant and the crime" must be considered by the sentencing authority. Zant v. Stephens, __ U.S. ___, 77 L.Ed.2d 235, 251 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586, 601-5 (1978) (Plurality Opinion). This Court has yet to hold that consideration of "the defendant and the crime" must necessarily be limited to matters of mitigation. Nevertheless, the individualized consideration required of the sentencing authority remains a paramount principle. The issue presented is of no different constitutional import than those previously decided by this Court. There is no need for this Court to review the matter further. Supreme Court Rule, Rule 17.

The New Mexico Supreme Court in deciding the question raised here held that the jury instruction complained of does not allow the consideration of non-statutory aggravating circumstances. The "defendant and the crime" factor relates to the weighing process and not the threshold determination of whether the

charged aggravating circumstance(s) exists. It concluded with the observation that there was no indication that the jury could consider non-statutory aggravating circumstances on the basis of the phrase "...considering the defendant and the crime." (Appendix, A-3). The New Mexico Supreme Court correctly decided this contention and its decision does not require further review by this Court. Supreme Court Rules, Rule 17.

Finally, Petitioner expends much effort in speculating that the jury was free to consider a variety of matters in potential aggravation, some of which would be constitutionally protected behavior. He attached a list at Appendix, page 24 for such material which the jury could have considered based upon the evidence at trial. He points out a variety of other possibilities the jury could have utilized in their sentencing decision. The answer to this aspect of his argument is twofold.

First, the record does not support the slightest suggestion that the jury did consider any such conduct, behavior or material in aggravation in reaching their decision. Petitioner does not make a minimal showing that these variously asserted non-statutory "aggravating" matters were considered by the jury at all. Secondly, his various assertions constitute no more than speculation. Absent a necessary record to establish his contentions, there is nothing this Court can review. The petition for writ of certiorari should be denied. Rule 17, supra.

POINT II

Petitioner's second contention is that he was denied due process and the right to counsel because the New Mexico Supreme Court considered cases outside of its published guidelines in conducting proportionality review. (Pet., 17-21, App., at 5).

To the extent Petitioner complains of the cases utilized by the New Mexico Supreme Court in reviewing his case, he did not challenge the use of such cases in his motion for rehearing. Petitioner alleges at the time the briefs were filed, no cases had yet been reviewed and decided upon which proportionality arguments could be made. This is correct. State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983), cert. denied, 102 S.Ct. 2464 (1983) had just promulgated the proportionality review guidelines a month before Petitioner's Brief-in-Chief was filed. When the decision on petitioner's case was issued, he filed a motion for rehearing. This motion did not challenge any aspects of the proportionality review conducted by the New Mexico Supreme Court. A copy of Petitioner's motion of rehearing is attached hereto as Appendix, 1-4. The order denying the motion for rehearing is found in Petitioner's Appendix at 8. Since this contention was not addressed to the New Mexico Supreme Court by the motion for rehearing, it is not properly before this Court for further review. Petitioner's failure to raise this contention in the New Mexico Supreme Court forecloses the propriety of any review by this Court. Fuller v. Oregon, 417 U.S. 40 (1974).

Secondly, the recent decision of this Court is another ground to deny review. In Pulley v. Harris, __ U.S. ___, 79 L.Ed.2d 29 (1984), this Court held that comparative proportionality review was not constitutionally required in every state court death sentence review. In Pulley, the Court observed:

> Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman. As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" (citations omitted) Id., 79 L.Ed.2d at 42.

Assuming that the New Mexico Supreme Court violated its own guidelines by including cases arguably outside the pool of cases permitted for proportionality review, there is no need for this Court to review the alleged error as a matter of constitutional law. Rule 17, supra.

Finally, Petitioner has alleged certain matters which are of dubious accuracy. He asserts that he was denied his rights under the Sixth and Fourteenth Amendments by reason of his attorney being denied information regarding death penalty cases. (Pet., 20). Petitioner's counsel was definitely not denied the information he asserts was necessary to argue the proportionality issue. As noted in State v. Garcia, supra, 99 N.M. at 780, fn.11, 664 P.2d at 978, the New Mexico Supreme Court imposed upon defendant's attorney the responsibility to supply that court with the information necessary on similar cases. The court noted such information was a matter of public record. The Petitioner was only denied such information to the extent that his request that the New Mexico Supreme Court direct the Attorney General's office to comply such information for him was denied. (Pet. App., 19-22).

In any event, Petitioner makes no allegation or showing in this Court that the cases utilized by the New Mexico Supreme Court in its proportionality analysis were detrimental to his rights. He cites two New Mexico decision which are alleged are inappropriate for such consideration. (Pet. 19-20). He contends that these cases included different aggravating circumstances

than his own. This is incorrect. The two cases each involved the identical but fewer aggravating circumstances than the jury found in the instant case. State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983) and State v. Simonson, __ N.M. ___, 669 P.2d 1092 (1983). Petitioner makes no argument, showing or otherwise that consideration of these cases operated to his prejudice on the proportionality issue. Absent such a showing, there is no factual basis upon which this Court could review the issue. Such a circumstance militates against review by this Court. Rule 17, supra.

POINT III

Petitioner finally argues that it is a violation of due process if one aggravating factor with alternative provisions is expanded into two separate aggravating factors. (Pet., 21-25). Petitioner argues that where one aggravating circumstance which can be committed in the course of two different felonies is separated into two separate aggravating circumstances, this somehow results in a violation of due process. Petitioner does not challenge the sufficiency of the evidence as to either alternative aggravating factor. He does not demonstrate how this procedures denied him due process.

Petitioner's initial argument is that if each of the aggravating felonies, criminal sexual penetration and kidnapping, were intended to be separate aggravating circumstances, each would have been listed has a separately lettered aggravating circumstance. (Pet., 21). How this conclusion is reached is not clear by the petition.

The second argument proceeds on the basis that the likelihood of the jury being more influenced by three aggravating circumstances instead of two was enhanced by the format of the actual instructions given to the jury. (Pet, 23-24, App., 17, 25). This curious argument contends that the actual typing of the mitigation instruction was "less distinguished" in format than the individual aggravation factors.

To the extent Petitioner was dissatisfied with the typed format of the respective aggravation and mitigation instructions, this issue has not been preserved for review in this Court. It was not raised in the trial court in the first instance. If petitioner wanted the mitigation instruction to be as "distinguished" as the aggravation instructions, he should have requested identical formats for both forms of instructions. Having failed to raise this claim in the trial court, the matter should

not be reviewed in this Court. Fuller v. Oregon, supra. The Petitioner did address this argument to the New Mexico Supreme Court which ignored it.

Petitioner combines the two foregoing contentions and speculates without a suggestion of support from the record that it is reasonable to assume that many jurors gave greater weight to the mere number of aggravating factors and considered them to be more significant than only two in the balancing process. (Pet., 23). Petitioner does not demonstrate how this deprived him of due process nor give this Court a hint as to the manner in which he suffered any prejudice, assuming error of any dimension occurred.

Petitioner does not argue that the evidence was insufficient as to either of the alternatives or the separate aggravating circumstances. As an issue of constitutional dimension, there is nothing for this Court to review. Such a conclusion is compelled by the jury findings on the aggravating circumstances. The jury unanimously found beyond a reasonable doubt Petitioner murdered a witness, the murder occurred during the crime of criminal sexual penetration and it occurred during kidnapping. (R.P., 393, 394 & 395; Pet. App. A-8.5).

In view of the jury findings, it is a reasonable inference that the jury would have imposed the same sentence, irrespective of the manner in which the three aggravating means of murder were presented to them. This claim does not merit review by this Court. Rule 17, supra.

Finally, the New Mexico Supreme Court correctly decided this issue adversely to Petitioner's position. The court assumed that when the legislature used the conjunction "or", it intended that either of the crimes could be used as an aggravating circumstance. The fact that both criminal sexual penetration and

kidnapping were contained in one subsection of the statutes is immaterial. (Pet. App., 3-4).

To the extent that the New Mexico Supreme Court relied on Zant v. Stephens, supra, that reliance is of no consequence in this case. For even if one of the aggravating circumstances were found to be invalid, it would not be invalid on an evidentiary basis but only on a numerical basis. The separate aggravating circumstances of murder in the commission of criminal sexual penetration and murder in the commission of a kidnapping are not sought to be reviewed on the basis that the evidence does not support one or the other.

Any invalidation could only be based upon "numerical" invalidity; that is, murder in the course of criminal sexual penetration and kidnapping should have been one aggravating circumstance by two different means. Since the jury found all three means to be established beyond a reasonable doubt, all means of the aggravating circumstances remain unchallenged on substantive grounds. Petitioner merely challenges the format of the aggravation as presented. This does not present a question of constitution dimension. The petition should be denied. Rule 17, supra.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL BARDACKE
Attorney General

ANTHONY TOPLER
Assistant Attorney General

Attorneys for Respondent
State of New Mexico
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6929

PARHAM & FINE, P.A.
ATTORNEYS AT LAW
812 MARQUETTE, N.W.
EDWARD G. PARHAM
JOSEPH M. FINE
ALBUQUERQUE, NEW MEXICO 87102
TELEPHONE
(505)243-4541

January 25, 1984

The Honorable Judge William R. Federici
New Mexico State Supreme Court
P. O. Box 848
Supreme Court Building
Santa Fe, New Mexico 87501

RE: State v. Guzman - No. 14,450

Dear Judge Federici:

Pursuant to our conversation on January 23rd in which you orally approved the enclosed Motion, I am enclosing the written Motion as well as the Motion for Rehearing. The original Motions have been filed with the Court Clerk.

Thank you for your consideration on this matter.

Very truly yours,

JOSEPH M. FINE

JMF/adj

Enclosures

cc: Attorney General

RECEIVED
JAN
ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

-versus- No. 14,450

MICHAEL ANTHONY GUZMAN,

Defendant-Appellant.

MOTION FOR EXTENSION OF TIME

Comes now MICHAEL ANTHONY GUZMAN, by and through his attorney of record, Joseph M. Fine, and respectfully requests that the Court extend the time for filing a Motion for Rehearing from January 23rd until January 25th.

As grounds for this Motion, Movant states that Joseph M. Fine was visiting his family in Florida until January 20th, 1983, did not see the decision until January 22nd and was ill upon returning to Albuquerque.

Respecfully submitted,

JOSEPH M. FINE
Attorney for Defendant-Appellant
812 Marquette, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-4541

I hereby certify that a true copy of the foregoing was sent to opposing counsel of record this 7th day of January, 1984.

BY: JOSEPH M. FINE

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

-versus- No. 14,450

MICHAEL ANTHONY GUZMAN,

Defendant-Appellant.

MOTION FOR REHEARING

Comes now MICHAEL ANTHONY GUZMAN, by and through his attorney of record, Joseph M. Fine, and moves the Court for a rehearing with respect to the above captioned case.

As grounds for this Motion, Movant states that he believes the Court has overlooked or misapprehended the following points of law or fact:

1. UJI Crim. 39.33 allows the jury to consider non-statutory aggravating circumstances although these circumstances are not specifically described as aggravating circumstances (See Brief-In-Chief at pp. 1-12);

2. Subsection 31-20A-5(B) was not intended by the New Mexico Legislature to permit more than one separate

aggravating factor (See Brief-In-Chief at pp. 17-22);

3. The Court is required to review whether the evidence supports a finding that the mitigating outweigh the aggravating circumstances and not whether the evidence supports the jury's determination of the death penalty, and the evidence does in fact support a finding that the mitigating outweigh the aggravating circumstances (See Brief-In-Chief at pp. ix-xxxviii and 25-28).

Respectfully submitted,

JOSEPH M. FINE
Attorney for Defendant-Appellant
812 Marquette, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-4541

I hereby certify that a true copy of the foregoing was sent to opposing counsel of record this 24th day of January, 1984.

BY: _____
JOSEPH M. FINE

END OF DOCKET